Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CELTRONIX TELEMETRY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission exceeded its authority from Congress to auction radio spectrum when it replaced a payment rule applicable to a license auctioned in 1994 with a new payment rule adopted in 1997.

PARTIES TO THE PROCEEDING

Petitioner, Celtronix Telemetry, Inc. (formerly named Community Teleplay, Inc.) is a closely held corporation. There is no parent company or publicly held company owning 10% or more of the corporation's stock.

Respondents are the Federal Communications Commission and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Celtronix Telemetry, Inc., Petitioner, by the undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 272 F.3d 585. The Federal Communications Commission's order (Pet. App. 12a-101a) is reported at 13 FCC Rcd 374, and its order denying Petitioner's petition for reconsideration (Pet. App. 102a-160a) is reported at 15 FCC Rcd 15293.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001 [Pet. App. 11a]. Petitioner timely filed a petition for rehearing that was denied on January 10, 2002 [Pet. App. 161a]. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 309(j) of the Communications Act, 47 U.S.C. §309(j), Section 551(4) of the Administrative Procedure Act, 5 U.S.C. §551(4), and the relevant Federal Communications Commission regulations, 47 C.F.R.§1.2110(d)(1994) and 47 C.F.R. §1.2110(f)(4)(1998), are reprinted in the appendix to this petition. Pet. App. 162a-186a.

STATEMENT OF THE CASE

In 1993 Congress authorized the Federal Communications Commission ("FCC" or "Commission") to award initial licenses for radio spectrum through competitive bidding, or auction. 47 U.S.C. §309(j)(1). Congress directed the FCC to design a competitive bidding system that would disseminate licenses among a wide variety of applicants, including small businesses. 47 U.S.C. §309(j)(3)(B). Congress instructed the FCC to pursue this objective by considering alternative payment schedules, including installment payments. 47 U.S.C. §309(4)(A). It instructed the FCC to prescribe regulations to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures." 47 U.S.C. §309(j)(4)(D).

In implementing this directive, the FCC adopted rules that allowed small businesses to pay eighty percent (80%) of their winning bids in installments. 47 C.F.R. §1.2110(d)(1994). Under the 1994 rules, a small business that was paying for a license in installments, and anticipated defaulting on a payment, could request a three to six month grace period, thereby avoiding automatic license cancellation for missing the payment. 47 C.F.R. §1.2110(d)(4)(ii)(1994). The rule stated:

> In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction buildout requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy.

47 C.F.R. §1.2110(d)(4)(ii)(1994). The 1994 rule provided that the license would automatically cancel if payments did not resume after the grace period or upon denial of a grace period request, or upon default with no such request submitted. 47 C.F.R. §1.2110(d)(4)(iii)(1994).

One of the first radio services for which the FCC conducted spectrum auctions was the Interactive Video and Data Service ("IVDS"). IVDS licenses were to be used to provide interactive television service to the American public. In July 1994, the FCC held an auction for IVDS licenses for metropolitan service areas. Petitioner, Celtronix Telemetry, Inc. ("Celtronix"), was the high bidder for an IVDS license for the Norfolk-Virginia Beach, Virginia area. Its winning bid was $850,000. As a small business, Celtronix qualified for installment payments. It made a twenty percent (20%) downpayment and agreed to pay the remaining 80% of its bid in installments in accordance with the FCC's rules.

By 1996, the interactive television technology – the basis on which the IVDS licenses were auctioned – proved to be a total failure. Celtronix thus began researching and deploying a new technology. In 1998, the company constructed its first base station transmitter in Norfolk-Virginia Beach, using the new technology to create a wireless telemetry system capable of providing services such as automatic vehicle location. By early 2000, the company had

completed construction of a network consisting of five base station transmitters and obtained its first paying customer.

As Celtronix deployed a new technology after the failure of interactive television, it requested grace periods for making installment payments. The company submitted grace period requests to the FCC in June and September 1995, and March 1997. In August 1997 the company supplemented the third request with financial information requested by the FCC, and a further supplement was filed in February 1998. Under the 1994 installment payment rule, the filing of these grace period requests prevented the automatic cancellation of the company's IVDS license. 47 C.F.R. §1.2110(d)(4)(1994).

In December 1997, the FCC amended its auction rules. *In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374 (1997)("*Grace Period Order*"). Among the changes was the elimination of the discretionary grace period rule. Pet. App. 19a-21a. In its place, the FCC adopted a new rule that gave ã licensee two automatic 90-day grace periods (a total of 180 days) for making an installment payment. If the payment was not made by the end of these two periods, the license automatically cancelled without any consideration of the licensee's individual circumstances. The new rule also imposed new late payment fees. 47 C.F.R. §1.2110(f)(4)(i)-(ii)(1998).[1]

In January 1998, Celtronix filed a petition for reconsideration of the *Grace Period Order*, arguing that applying the new payment rule to a license auctioned under the 1994 rule made it retroactive in violation of the Administrative Procedure Act ("APA"), which limits "rules" to agency prescriptions of future effect. Pet. App. 187a-199a. Celtronix argued that that the new rule was impermissibly retroactive because it impaired its right under the 1994 rule to

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[1]The new rule was later re-designated 47 C.F.R. §1.2110(g)(4)(i)-(ii).

request grace periods and avoid automatic license cancellation based on a review of its individual circumstances. Celtronix also argued that the failure of the interactive television technology had forced IVDS licensees to start over in developing the IVDS spectrum, a circumstance that the availability of further grace periods under the 1994 rule could accommodate while the new rule did not. *Id.* at 191a. Further, Celtronix argued that the FCC could not unilaterally eliminate or alter the rights that Celtronix possessed under the financing agreement for its license without violating basic principles of contract law. It showed that nothing put the company on notice that the terms and conditions of installment payments would be subject to amendments, and that those terms were represented as "not-negotiable" in the "Bidder's Package" the FCC circulated prior to the auction. Pet. App. 193a-194a, 197a-198a.

Application of the new rule to Celtronix would have required it to make an installment payment by September 29, 1998 or automatically lose its license. The company thus asked the FCC to stay the new rule pending reconsideration. The FCC did not act on this request. Instead, eleven days before the payment due date, it suspended installments for IVDS licensees while it conducted a rulemaking for this service, which it renamed the "218-219 MHz Service." See *In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 13 FCC Rcd 19064 (1998).[2]

In September 1999, the FCC gave each IVDS licensee three options: (1) resume installment payments under the new rules (i.e., with no right to file discretionary grace period requests); (2) return the license for forgiveness of the debt still owed on it ("amnesty"); or (3) prepay for the license in full. See *In the Matter of Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 15 FCC Rcd 1497, ¶34 (1999)("*218-219 MHz Service Order*"). The FCC dismissed Celtronix's

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[2] The terms "IVDS" and "218-219 MHz Service" are used interchangeably.

grace period requests and motion for stay, stating that the company would not be disadvantaged by the new payment rules and that the period of payment suspension was in excess of any grace period that the FCC might have provided. *Id.* at ¶45.

Celtronix sought reconsideration of the *218-219 MHz Service Order* in October 1999, noting that the agency had not acted on its 1998 petition for reconsideration of the *Grace Period Order*. The FCC finally denied the 1998 petition in August 2000. *In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Order on Reconsideration*, 15 FCC Rcd 15293 (2000)("*Reconsideration Order*"). On the retroactivity issue, the FCC decided that its new installment payment rules did not violate the prohibition on "primary retroactivty" because the agency had "merely prescribed rules for the future, *i.e.*, prospective procedures by which licensees remit installment payments after March 16, 1998, the effective date of the new rules, that deal with past transactions, *i.e.*, the previously established installment payment obligations." Pet. App. 117a. The FCC stated, "Further, the fact that the new rules may unsettle expectations about the economic benefits of participating in the installment payment plan does not make the new rules unlawfully retroactive." *Id.* at 117a-118a. The FCC held that this was the type of "secondary" retroactivity that is lawful, and that licensees have "no vested right to an unchanged regulatory scheme throughout their license term." *Id.* The agency did not address Petitioner's argument that the IVDS technology failure justified retaining the original rule. *Id.*

On the breach of contract issue, the FCC held that it had afforded "extraordinary relief" to licensees by suspending the effect of the new installment payment rule pending the 218-219 MHz Service rulemaking and, therefore, "there is no conflict between the application of the new late payment procedures and contract law." Pet. App. at 118a-119a. It further stated that "licensees were aware, or should have been aware, that the terms and conditions of Part 1 or

other aspects of the license can be modified by the Commission by rulemaking, and that such changes have been uniformly upheld by the courts as lawful." *Id.* at 119a. The FCC stated that the payment rules were modified "subject to APA-consistent rulemaking procedures" and concluded that the application of the modified payment provisions did not constitute a breach of contract. *Id.*

The FCC denied reconsideration of its *218-219 MHz Service Order*, 15 FCC Rcd 25020 (2000), and proceeded to mandate that IVDS licensees, including Celtronix, choose one of three options by January 31, 2001, *i.e.*, resume installment payments under the new rules, return the license for amnesty, or prepay the remaining amount owed for the license. See *Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) And Amended Eligibility List For 218-219 MHz Service*," Public Notice, DA 01-9, released January 3, 2001. Celtronix returned its license under protest, citing its appeal of the *Grace Period Order* and *Reconsideration Order* filed with the United States Court of Appeals for the District of Columbia Circuit on September 13, 2000.

After briefing and oral argument, the court of appeals affirmed the FCC's orders. It found that the transaction affected by the new rule was the delay in payments, not the initial issuance of the license. Pet. App. 6a-7a. It concluded that the new rule did not affect past payment delays, but only future ones, and therefore was not impermissibly retroactive. *Id.* The court also held that Petitioner had no vested right to keep requesting grace periods because "the pre-auction license system offered no vested right to any specific terms." *Id.* at 7a. The court observed that the FCC "always retained the power to alter the term of existing licenses by rulemaking." *Id.* It further observed that "Congress provided both that the Commission would retain its authority 'to regulate or reclaim spectrum licenses,' 47 U.S.C. §309(j)(6)(C), and that nothing in the use of auctions would 'be construed to convey any rights...that differ from the rights that apply to other licenses....' *Id.* §309(j)(6)(D)." *Id.*

The court, finding that the rule change was an example of "secondary retroactivity," determined that it was both reasonable in substance and in being made retroactive, its harms outweighing its benefits, "[s]o, at least the Commission could reasonably have concluded." *Id.* at 7a-8a. In rejecting Petitioner's breach of contract claim, the court held that the FCC had never promised not to change its regulations, there being "a long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understandings to licenses acquired by auction." *Id.* at 8a-9a.

On December 26, 2001, Petitioner filed a timely petition for rehearing. The court denied the petition on January 10, 2002. Pet. App. 161a.

REASONS FOR GRANTING THE PETITION

By ruling that the auction authority Congress granted to the FCC permits the agency to modify, through rulemaking, the payment terms of a financing agreement for a license that has already been auctioned, the court of appeals' decision undermines the certainty of the binding contract an auction is supposed to create. "General principles of auction law provide a baseline rule that the close of an auction – the fall of the hammer – signals acceptance of the offer and creation of a binding contract between the seller and the high bidder." *In re GWI PCS 1, Inc.*, 230 F.3d 788, 807 (5th Cir. 2000), cert denied, 121 S. Ct. 2623 (2001). The D.C. Circuit's ruling in the instant case, however, means that the FCC may unilaterally go back and modify the terms of existing auction contracts by rulemaking. The court's decision fails to uphold the integrity of the auction process and the contractual relationship established between the seller and the high bidder.

Congress did not include in the FCC's auction authority the power to adopt retroactive rules that alter payment terms for auctioned licenses after the auction has occurred, however "reasonable" such modifications may later

seem. Congress stated that the Commission would retain its authority "to regulate or reclaim spectrum licenses," 47 U.S.C. §309(j)(6)(C), and that nothing in the use of auctions could "be construed to convey any rights ... that differ from the rights that apply to other licenses...." §309(j)(6)(D). Far from authorizing the FCC to change the payment terms of an auction contract already made with a high bidder for a spectrum license, these provisions do not shield the agency from APA requirements or the law of contracts.

"Retroactivity is not favored in the law" and "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed in express terms." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Sections 309(j)(6)(C) and (D) do not convey "in express terms" power to the FCC to modify payment terms of existing auction contracts through rulemaking. Interpreting these provisions to convey such power is unreasonable. It would mean that the FCC could modify *any* of the payment terms for a license it has already auctioned, whether or not the buyer agreed to such modifications. Congress has made no determination that the potential unfairness of such retroactive changes is outweighed by countervailing benefits. *Landgraf v. USI Film Products*, 511 U.S. 244, 272-273 (1994).

By including license payment terms within "the term of existing licenses" that can be altered, Pet. App. 7a, the court failed to distinguish contract terms created by an auction from the terms governing the licensee's station operations. By holding that payment terms for an auctioned license may be changed as easily as technical rules through rulemaking, the court has exempted the FCC and government spectrum auctions from the bounds of contract law. Its decision will have an adverse impact on spectrum auctions because there can be no certainty that the terms of an auction contract will remain intact after the auction, and will not be changed by the FCC without the buyer's consent. Lacking

that certainty, bidders should beware of participating in such auctions.

The same court of appeals has held that FCC auction contracts with high bidders are not exempt from the application of the bankruptcy laws. In *NextWave Personal Communications, Inc. v. F.C.C.*, 254 F.3d 130, 155-56 (D.C. Cir. 2001), cert. granted, __ U.S. __, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002)(Nos. 01-653, 01-657), "[h]aving chosen...a scheme that put it in a creditor-debtor (and lienholder) relationship with its licensees and conditioned licenses on timely payment of their debts, and having as a consequence run afoul of section 525 of the Bankruptcy Code, the Commission may not escape that provision's clear command simply because it acted for a regulatory purpose." Yet here the court has allowed the FCC, acting for a regulatory purpose, to escape the commands of the APA and contract law in the absence of any express authority from Congress conveying power to the agency to adopt retroactive rules that modify existing contracts.

In *United States v. Winstar Corp* 518 U.S. 839 (1996), this Court held that "allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" The court of appeals' decision conflicts with this holding. It ignored Petitioner's argument that, prior to the auction, the FCC represented to bidders that the terms were "not negotiable," nor did the court cite anything to support that the FCC placed bidders on notice that payment terms could change. Instead, the court merely relied on the "long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understandings to licenses acquired by auction." Pet. App. 9a.

The court erred by treating "payment delays" as the "transaction" it found to be the relevant retroactivity event in this case. "Payment delays" are not a "transaction." The "transaction" – the relevant retroactivity event – is the contract created by the auction. Issuance of the license to the high bidder and the payment terms for that license, including those governing "payment delays," are parts of the same contract that govern the creditor-debtor relationship between the government and Petitioner and vest rights in each party.

By concluding that "payment delays" are the relevant retroactivity event, the court misconstrued the gambling casino example Justice Scalia described in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), where he observed that a new ban on gambling does not have impermissible retroactive effects on existing casinos. See Pet. App. 6a-7a. In that example, the construction of a casino and gambling are separate activities. A prospective ban on gambling does not alter the terms of the casino construction contracts, though it may affect those past transactions and their value. Affecting past transactions without altering their terms, if reasonable, is permitted secondary retroactivity under Justice Scalia's analysis. *Landgraf v. USI Film Products*, 511 U.S. 244, at 293-294 (Scalia, J., concurring); *see also*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219-220 (1988)(Scalia, J., concurring). Similarly, in *Bowen*, the labor and supply contracts on the one hand, and the government's reimbursement formulas on the other, were separate activities.[3] They were not fused into a single transaction between one set of parties.

Here, however, the government is a party to a contract created by its 1994 spectrum auction. By changing its regulations in 1997 to eliminate discretionary grace

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[3]In *Bowen*, the government was reimbursing health care providers for services performed for Medicare beneficiaries. 488 U.S. at 205. The government was not, however, a party to the service contracts involved, though it affected them when it changed its reimbursement formulas.

periods, then grafting that change into the 1994 auction contract, the FCC altered the law of the past it used to define the terms of that contract. The issuance of the license and terms for payment, including grace period requests, are part of the same transaction. It was therefore error for the court to define the relative retroactivity event as "payment delays" in deciding the APA issue.

The court erred in finding that Petitioner had no "vested right" to request additional grace periods. Pet. App. 7a. It ignored the pre-auction "Bidders Package" that offered the installment payment terms to small businesses as stated in the 1994 rule, terms the FCC represented as being "not negotiable," nor did the court recognize that the FCC's acceptance of Petitioner's high bid created a contract containing those terms. Rather, the court cited cases to support the proposition that the FCC "always retained the power to alter the term of existing licenses by rulemaking." *Id.* All of these cases, however, dealt with rules involving licensees' technical operations, network practices, or concentration of ownership, not with contracts the government made with license purchasers.[4]

The relief afforded by the 1994 grace period rule for payment delays was discretionary. It was up to the FCC to decide whether to grant grace periods based on showings made in Petitioner's requests. However, the discretionary nature of the relief provided by the 1994 rule does not prevent consideration of Petitioner's reasonable reliance on the continued availability of such relief in deciding whether

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[4]See Pet App. at 7a, citing, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956)(ownership concentration); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943)(network practices); *Committee for Effective Cellular Rules v. FCC*,.53 F.3d 1309, 1319-20 (D.C. Cir. 1995)(definition of licensed service areas); *WBEN, Inc. v. FCC*, 396 F.2d 601, 617-618 (2d Cir.1968)(broadcast technical operations). The court's reliance on *Bergerco Canada v. U.S. Treasury Dept.*, 129 F.3d 189, 195 (D.C. Cir. 1997) was also misplaced. Pet. App. 6a. None of the applicants in *Bergerco* or the cases cited therein had a contract with the government incorporating rules as contract terms. Therefore none had any "vested rights" created by those rules.

its elimination has retroactive effect. *I.N.S. v. St. Cyr*, 121 S. Ct. 2271, 2292-2293 (2001). Filing a request for a discretionary grace period avoided automatic license cancellation. It created at least the possibility of obtaining more time to make license payments. Petitioner relied upon and exercised this right several times as it started over with a new technology after the initial one failed. The new rule, limiting payment extensions to a maximum of 180 days, after which license cancellation is automatic for failing to pay, eliminated this right. The retroactive effect was obvious and severe: without the ability to request more time to make payments, Petitioner returned its license under protest and was ordered to shut down the network it had constructed that was just beginning to serve paying customers.[5]

The court concluded that the new payment rule survived a secondary retroactivity analysis because it was reasonable both in substance and in being made retroactive. Pet. App. 8a. However, the "reasonableness" of the FCC's new payment rule is irrelevant because it has primary retroactive effect by altering the payment terms of a past auction contract. It was error to extend a "reasonableness" inquiry to "purported rules that not merely affect past transactions but change what was the law in the past. Quite simply, a rule is an agency statement 'of future effect,' not 'of future effect and/or reasonable past effect.'" *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 220 (Scalia, J., concurring).

Petitioner's 1998 petition for reconsideration described the injury that would result if the 1994 rule was eliminated and replaced with the 1997 rule. Pet. App. 190a-

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[5]The court stated that "Celtronix chose to return the license to the Commission for amnesty, subject to its claim for a disaggregation alternative." Pet. App. 4a. While Celtronix proposed "disaggregation" as a fourth option, i.e., retaining a portion of its spectrum and returning the rest to the FCC, it returned its license *under protest* also citing its appeal to the D.C. Circuit of the agency's *Grace Period Order* and *Reconsideration Order* that changed the installment payment rule, thus seeking the option of retaining the *entire* license and resuming payments under the *original terms* of the 1994 auction contract.

194a. Petitioner explained that the IVDS technology failure forced IVDS licensees to start completely over in developing this spectrum and that years would be needed to do so. *Id.* Celtronix argued that the 1994 rule accommodated the financial distress caused by the technology failure while the 1997 rule did not. *Id.* The FCC's *Reconsideration Order* totally ignored this argument, giving it not one sentence. Celtronix repeated this point in its court briefs, arguing that the FCC's failure to address IVDS technology problems as a reason for retaining the 1994 rule meant that its secondary retroactivity analysis of the 1997 rule failed the reasonableness standard.

The court substituted its own reasonableness analysis for the agency's incomplete one, concluding:

> In sum, when one considers both the interests of licensees generally and of the Commission, the rule change's harms (the amorphous injury to hypothetical successful pleaders for discretionary grace, and the penalty fees) seem outweighed by its benefits (the certainty and clarity for all concerned and the elimination of a possibly long and costly decision making process under vague criteria). So, at least, the Commission could reasonably have concluded.

Pet. App. 8a. Such an analysis is nonexistent in the agency's *Grace Period Order* and *Reconsideration Order*. Those orders did not address Petitioner's argument for retaining the 1994 rule because of the IVDS technology failure, or explain how the harms of the 1997 rule were outweighed by its benefits. The FCC never stated that the "criteria" under the 1994 rule for grace periods were "vague" and explain how that vagueness justified the rule's elimination. The 1994 rule, in fact, is very clear as to what the FCC would consider in reviewing grace period requests. Pet. App. 184a. By substituting its own analysis, the court of appeals' decision conflicts with this Court's holding that, "The scope of review

under the 'arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1982).

The court misapprehended the significance of the difference between the 1994 rule and 1997 rule. It found that the 1994 rule offered licensees the possibility of receiving more than one discretionary grace periods, whereas the 1997 rule strictly limits them to two automatic, non-discretionary ones. Pet. App. 2a. The court failed to take notice that the 1994 rule already entitled licensees to one non-discretionary 90-day grace period. The 1997 rule merely added one additional non-discretionary 90-day grace period. If two grace periods are not enough for a particular licensee under the 1997 rule, its license automatically cancels without the review of its individual circumstances that was afforded by the 1994 rule. Such a change is disadvantageous for the class of small business licensees eligible for the installment payment plan. It is not "easy to find" that the 1997 rule is a "liberalization" or is otherwise reasonable for such licensees. Pet. App. 8a.

The court further stated:

> Moreover, it seems utterly improbable that the old grace provisions could have induced reliance, either in the form of higher bids by licensees at the bidding stage (as the change is so trivial and likely beneficial), or of any different conduct thereafter (as both the old and new rule provide substantially equal motivations to avoid default).

Pet. App. 8a. The FCC, however, never made such a finding in upholding the 1997 rule. The court simply ignored Petitioner's conduct in submitting grace period requests in 1995 and 1997 in reliance on the 1994 rule.

The D.C. Circuit's retroactivity and contract law analysis conflict with this Court's prior holdings that the government may not use its regulatory powers to eliminate vested rights by altering the law of the past or breaching agreements with private citizens. The D.C. Circuit's decision creates serious doubts about whether the government will be bound by the contracts created by its spectrum auctions and will observe their terms without unilaterally modifying them through subsequent rulemaking. This is an issue of national importance that should be reviewed by this Court.

CONCLUSION

Therefore, Petitioner Celtronix Telemetry, Inc. requests of this Court that it grant its Petition for a Writ of Certorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Richard S. Myers
Counsel of Record
Myers Lazrus Technology
Law Group
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Washington, D.C. 20036

CELTRONIX TELEMETRY, INC., APPELLANT/PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION, ET AL., APPELLEE/RESPONDENTS

Nos. 00-1400 & 00-1401

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October 18, 2001, Argued

November 16, 2001, Decided

COUNSEL:
Richard S. Myers argued the cause and filed the briefs for appellant/petitioner.

Stewart A. Block, Counsel, Federal Communications Commission, argued the cause for appellee/respondents. With him on the brief were Jane E. Mago, General Counsel, Daniel M. Armstrong, Associate General Counsel, Catherine G. O'Sullivan and Andrea Limmer, Attorneys, U.S. Department of Justice.

JUDGES:
Before: GINSBURG, Chief Judge, HENDERSON, Circuit Judge, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

OPINIONBY:
WILLIAMS

OPINION:

[*585]

WILLIAMS, *Senior Circuit Judge*: In 1994 the Federal Communications Commission auctioned off a group of Interactive Video and Data Service ("IVDS") licenses. In 1997 it changed the rules governing grace periods for winning bidders who made late installment payments. Celtronix, a

winning bidder for such a license, alleges that the change was unlawfully retroactive. We affirm the Commission's decision.

* * *

In a June 1994 auction Celtronix (then known as Community Teleplay, Inc.) won an IVDS license for the Norfolk-Virginia Beach Metropolitan [**2] Service Area. As a small business, Celtronix was allowed to [*586] pay its winning bid in installments over the term of the license. *47 C.F.R. § 1.2110(d)* (1994). The regulation provided that any payment would be in default after 90 days delinquency, but allowed a licensee to request a three-to-six-month grace period. *Id.* § 1.2110(d)(4)(i), (ii). In considering whether to grant the grace period, the Commission could consider the licensee's payment history, the reasons for default, the licensee's financial condition, and other circumstances. *Id.* Though its regulations were not exactly clear on the availability of additional grace periods, the Commission issued a public notice claiming discretion to "extend or grant additional grace periods where circumstances warrant." Public Notice, "Wireless Telecommunications Bureau Staff Clarifies 'Grace Period' Rule for IVDS 'Auction' Licensees Paying By Installment Payments," *10 FCC Rcd 10724 (1995).*

In 1997 the Commission changed its grace period rule in the *Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374 (1997)* ("*Grace Period Order*"). Under [**3] the new regulation, a licensee who missed a payment would automatically have 90 extra days to do so without being considered delinquent. *47 C.F.R. § 1.2110(f)(4)(i)* (1998). This came at the price of a 5% late fee on the amount past due. *Id.* Failure to make payment at the end of the first 90-day period would result in a second automatic 90-day grace period and a 10% late fee. *Id.* § 1.2110(f)(4)(ii). (Formerly, there had been an interest charge, amortized over the term of the license.) Any licensee failing to make payment after 180 days delinquency (or failing to pay the late fee) would then be in default. *Id.* § 1.2110(f)(4)(iii), (iv). n1

Celtronix filed a petition for reconsideration of the *Grace Period Order* in January 1998 and, in July of that year, an

emergency [**4] motion for stay pending review of the petition. But in September 1998, just before the final date on which Celtronix's license would have been permanently defaulted, the Commission announced a notice of a proposed rulemaking aimed at introducing new flexibility for spectrum occupied by IVDS licensees; to reflect the change it immediately redesignated the service as the "218-219 Mhz Service." Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 19064 P 16 (1998)*. For the duration of that rulemaking the Commission suspended all installment payments for licensees who were paid up through March 16, 1998 or had properly filed grace period requests. *Id.* P 13.

In its final order on the 218-219 Mhz Service, Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999)* ("*218-219 MHz Service Order*"), the Commission dismissed Celtronix's grace period requests and its emergency stay motion, saying [**5] that parties that had properly filed grace period requests had already received "an extended grace period." *Id.* P P 45, 133. It also provided three options for licensees in Celtronix's situation: (1) reamortization and the resumption of installment payments; (2) amnesty, under which the licensee could return the license, have its debt forgiven, and receive a partial refund of prior payments; and (3) prepayment of the entire amount. *Id.* P 34. Additionally, the Commission provided that the former 5-year [*587] term would be extended to 10 years. *Id.* P P 25-32.

Celtronix sought reconsideration of the *218-219 MHz Service Order* in December 1999. While that was pending, the Commission denied Celtronix's petition for reconsideration of the *Grace Period Order*. Amendment of Part 1 of the Commission's Rules--Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, P 27 (2000)*. Then, in December 2000, the Commission denied reconsideration of

the *218-219 MHz Service Order*, and reaffirmed that IVDS licensees must decide among the three options [**6] of amnesty, resuming repayment, or prepayment of the entire amount. See Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration, 15 FCC Rcd 25020*, P P 1, 34 (2000). It rejected Celtronix's proposal of a fourth option under which licensees could disaggregate, i.e., could retain part of their 218-219 Mhz spectrum for a given market and return the rest to the Commission. *Id.* at P P 14-20.

Celtronix chose to return the license to the Commission for amnesty, subject to its claim for a disaggregation alternative. It filed a petition for reconsideration of this order, which is still pending before the Commission.

As to the *Grace Period Order*, Celtronix filed a petition for review under § 402(a) of the *Communications Act (2001 U.S App. LEXIS 24553*, No. 00-1401) and an appeal under § 402(b) *(2001 U.S. App. LEXIS 24553*, No. 00-1400). Since these jurisdictional provisions are mutually exclusive, see *Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 177 (D.C. Cir. 1997)*, and because Celtronix's case falls into none of the categories in § 402(b)(1) through (8), we dismiss appeal No. 00-1400 and take jurisdiction [**7] for No. 00-1401 under § 402(a).

There is another jurisdictional concern. Given Celtronix's election of amnesty in the event that its disaggregation proposal does not prevail (either by Commission change of heart or by judicial reversal of the Commission), there is a distinct chance that Celtronix would not benefit from a victory here; absent disaggregation, it would simply take its amnesty and depart. But we do not see this possibility as impairing its standing. Compare a standard two-issue case: If a plaintiff presents two or more alternative grounds as routes to its hoped-for ultimate victory, a court does not lose jurisdiction over the second claim once it has ruled in the plaintiff's favor on the first claim; victory on the first claim doesn't moot the second. *Air Line Pilots Ass'n Int'l v. UAL Corp., 897 F.2d 1394, 1397 (7th Cir. 1990)*. Conversely, if a

party must prevail on both of two theories to achieve a meaningful win (e.g., knock out a regulation), its loss on the first does not moot the second. *Worldcom, Inc. v. FCC, 246 F.3d 690, 695 (D.C. Cir. 2001)*. For both situations, the continued exercise of jurisdiction by the court is based on [**8] a practical consideration: Disposition of both bases has the potential of achieving judicial economies, as higher-level review might remove the first basis for the outcome. See *id.*

Just as the contingent character of the ruling on the second issue in the above cases does not spell mootness, so too the fact that here Celtronix's ultimate success may depend on the outcome of pending administrative litigation should not be seen as rendering the harm inflicted on it by the Commission's grace period decision too "conjectural" for purposes of standing. *City of Los Angeles v. Lyons, 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)*. Otherwise, a party requiring victory on [*588] two fronts in two fora could easily lose his chance for review on the first claim to be put forward for adjudication, see *28 U.S.C. § 2344* (requiring petition for review to be filed within 60 days), thus destroying his chance of prevailing, regardless of the merits.

* * *

Celtronix argues that the new grace period rule, *47 C.F.R. § 1.2110(g)(4)*, violates the Administrative Procedure Act, which limits "rules" to agency prescriptions of "future [**9] effect." *5 U.S.C. § 551*(4); see *Bowen v. Georgetown University Hospital, 488 U.S. 204, 216-25, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988)* (Scalia, J., concurring); *Bergerco Canada v. U.S. Treasury Department, 327 U.S. App. D.C. 106, 129 F.3d 189, 192-93 (D.C. Cir. 1997)* (treating Justice Scalia's concurring opinion as substantially authoritative, though noting that "the *Bowen* majority, to be sure, neither embraced nor rejected Justice Scalia's view"). To a large extent Celtronix invokes the criteria applied in *Landgraf v. USI Film Products, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)*, a case that explored the question of what sort of retroactivity was subject to the longstanding presumption against retroactive statutes. *Id. at 263-80.*

Here, of course, there is no issue of intent at all: the Commission indisputably intended its new grace period rule to apply to payment delays occurring after the rule's adoption but in connection with previously issued licenses. Nonetheless, the tests formulated in *Landgraf* are indeed pertinent to the APA issue. See, e.g., *Bergerco Canada, 129 F.3d at 193;* [**10] *DIRECTV v. FCC, 324 U.S. App. D.C. 72, 110 F.3d 816, 825-26 (D.C. Cir. 1997).*

According to Justice Scalia, a retroactive rule forbidden by the APA is one which "alters the *past* legal consequences of past actions." *Bowen, 488 U.S. at 219.* In *Landgraf*, the Court said that retroactivity occurred where a statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *511 U.S. at 280.*

It seems impossible to characterize the rule change here as "altering the past legal consequences" of a past action. It altered the *future* effect of the initial license issuance, to be sure, but that could not be viewed as "past legal consequences." Nor could the change be said to impair rights possessed by Celtronix when it acted, as it could have had no grace period rights before it "acted" to acquire the license, and any payment delay covered by the new rule, i.e., any delay not already excused, necessarily occurred after the rule change. If the rule could be viewed as "imposing new duties" at all (in the sense of making the duty [**11] to pay installments more stringent), it would run afoul of *Landgraf*'s concept *only* if it imposed them with regard to a "transaction[ ] already completed." That would be so if the "transaction" at issue were the issuance of the license itself, as Celtronix urges, rather than the delay in payments.

The examples used in the cases make clear that we should focus on the *payment delays* and not on initial *issuance* of the license. As Justice Scalia noted in *Landgraf*, a new ban on gambling would not involve retroactivity in its application to existing casinos (which presumably would have been *licensed* by a state), because the "relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos." *Landgraf, 511 U.S.*

at 293 n.3 (Scalia, J., concurring). Similarly, Justice Scalia made clear in *Bowen* that there would be no violation of the APA's insistence on rules of "future effect" if the Secretary there had promulgated new reimbursement [*589] formulas for future services, even though the hospitals in question were operating under long-term contracts negotiated in reliance on a prior, more generous rule. [**12] *488 U.S. at 220.*

Celtronix claims to have had a "vested right" to keep requesting additional grace periods and to force the Commission to consider any unique circumstances. To this end, it cites *Landgraf*'s statement that the judicial clear statement rule would apply where a statute would otherwise "impair rights a party possessed when he acted." *511 U.S. at 280.* n2 But Celtronix never explains where this vested right came from. The pre-auction license system offered no vested right to any specific terms. Rather, it is undisputed that the Commission always retained the power to alter the term of existing licenses by rulemaking. See, e.g., *United States v. Storer Broadcast Co., 351 U.S. 192, 205, 100 L. Ed. 1081, 76 S. Ct. 763 (1956); National Broadcasting Co. v. United States, 319 U.S. 190, 225, 87 L. Ed. 1344, 63 S. Ct. 997 (1943); Committee for Effective Cellular Rules v. FCC, 311 U.S. App. D.C. 345, 53 F.3d 1309, 1319-20 (D.C. Cir. 1995); WBEN, Inc. v. FCC, 396 F.2d 601, 617-18 (2d Cir. 1968).*

The introduction of auctions made no change in this aspect of the licensing regime. In fact, Congress provided both that the Commission would retain its authority "to regulate or reclaim spectrum licenses," *47 U.S.C. § 309*(j)(6)(C), and that nothing in the use of auctions would "be construed to convey any rights ... that differ from the rights that apply to other licenses...." *Id.* § 309(j)(6)(D).

Of course the grace period change may have altered the value of the rights Celtronix acquired by its winning bid and commitment to make the required payments. This sort of retroactivity–characteristic of a rule having exclusively "future effect" but affecting the desirability of past transactions–has become known as "secondary retroactivity." See *Bowen, 488 U.S. at 219-20* (Scalia, J., concurring).

Under our authority to set aside rules that are arbitrary and capricious, we review such rules to see whether they are reasonable, "both in substance *and in being made retroactive.*" *U.S. Airwaves, Inc. v. FCC, 344 U.S. App. D.C. 10, 232 F.3d 227, 233 (D.C. Cir. 2000)* (emphasis added).

Here it's easy to find the rule reasonable [**14] in both respects. The Commission merely replaced the possibility of two (or maybe more) three-month grace periods, available only on a successful appeal to the Commission's discretion, with the assurance of two 90-day periods subject to 5% and 10% penalties on the delayed payments. Looking at licensees as a class, there is no reason to think the change disadvantageous. Indeed, the Commission described the change as a "liberalization." *Grace Period Order*, P 108. Nor does Celtronix suggest that the rule change would inflict material injuries on any set of licensees (such as ones whose circumstances made receipt of Commission grace especially likely) that would offset its beneficial effects, or indeed that the Commission has *ever* exercised its discretion favorably. Moreover, it seems utterly improbable that the old grace provisions could have induced reliance, either in the form of higher [*590] bids by licensees at the bidding stage (as the change is so trivial and likely beneficial), or of any different conduct thereafter (as both old and new rule provide substantially equal motivations to avoid default). See *Bergerco, 129 F.3d at 195.* In sum, when one considers both [**15] the interests of licensees generally and of the Commission, the rule change's harms (the amorphous injury to hypothetical successful pleaders for discretionary grace, and the penalty fees) seem outweighed by its benefits (the certainty and clarity for all concerned and the elimination of a possibly long and costly decision making process under vague criteria). So, at least, the Commission could reasonably have concluded.

Celtronix also urges a somewhat makeshift argument that the FCC's rule change was a breach of contract, citing *United States v. Winstar Corp., 518 U.S. 839, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996).* But there the government had contractually bound itself to bear the risk of specified regulatory change adverse to certain firms that had acquired

failed saving and loan associations in reliance on that promise. *Id. at 868-71.* Here, far from there being any such promise, there was, as we've noted, a long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understandings to licenses acquired by auction.

* * *

The order of the Commission is

[**16] *Affirmed.*

----------Footnotes----------

n1 The current version of the rule provides that the grace period shall be a quarter year, rather than 90 days, but is otherwise similar in substance. *47 C.F.R. § 1.2110(g)(4)(i)* (2000).

----------End Footnotes----------

2 The passage cited by Celtronix in fact makes no reference to "vested" rights, but other parts of the opinion do. See *511 U.S. at 268-69 & n.23* (quoting "vested rights" language from Justice Story's opinion in *Society for Propagation of the Gospel v. Wheeler, 2 Gall. 105, 22 F. Cas. 756, 767* (No. 13,156) (CC NH 1814), and from *Sturges v. Carter, 114 U.S. 511, 519, 29 L. Ed. 240, 5 S. Ct. 1014 (1885)); id.* at 275 n.29; see also *id.* at 290-94 (Scalia, J., concurring) (critiquing "vested rights" usage).

----------End Footnotes---------- [**13]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1400 & 00- 1401
September Term, 2001

Celtronix Telemetry, Inc.,

v.

Federal Communications
Appellee/Respondents

Appeal from and Petition for Review of an Order of the Federal Communications Commission

Before: GINSBURG, Chief Judge; HENDERSON, Circuit Judge; and WILLIAMS, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the record compiled by the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the order of the Federal Communications Commission appealed from herein is affirmed, in accordance with the opinion of the court filed this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Date: November 16, 2001
Opinion for the court filed by Senior Circuit Judge Williams.

NOTE: An Erratum is attached to the end of this document.

NOTE: A second Erratum is attached to the end of this document.

Federal Communications Commission (F.C.C.)

Third Report and Order and Second Further Notice of Proposed Rule Making

IN THE MATTER OF AMENDMENT OF PART 1 OF THE COMMISSION'S RULES – COMPETITIVE BIDDING PROCEDURES
WT Docket No. 97-82

Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use
ET Docket No. 94-32

4660-4685 MHz

FCC 97-413
Adopted: December 18, 1997
Released: December 31, 1997

Comments Due: February 6, 1998

Reply Comments Due: February 17, 1998

By the Commission: Commissioners Furchtgott-Roth and Tristani issuing separate statements.

I. INTRODUCTION

1. In this Third Report and Order, we make substantive amendments and modifications to our general competitive bidding rules for all auctionable services. These changes to

our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants. The changes also advance our auction program by reducing the burden on the Commission and the public of conducting service-by-service auction rule makings. In the Competitive Bidding Second Report and Order in PP Docket No. 93-253, we stated that we would "issue further Reports and Orders ... to adopt auction rules for each auctionable service or class of service," [FN1] and we identified criteria that would govern our choice of service-specific auction rules and procedures, which may be found in Subpart Q of Part 1 of our rules. [FN2] Since adoption of the Competitive Bidding Second Report and Order, the Commission has completed 15 spectrum auction, adopting service-specific competitive bidding rules for each one. [FN3] Based on the experience we have gained from the completed auctions and the comments we have received from commenters, [FN4] we here adopt general competitive bidding rules to provide for a more consistent and efficient licensing process for all auctionable services.

2. In this Second Further Notice of Proposed Rule Making, we seek comment on additional issues relating to our general competitive bidding rules for all auctionable services, including ways in which the Commission might offer an effective installment payment program in the future. Finally, we seek comment on our proposal to supersede the rules for the auction of General Wireless Communications Services (GWCS) spectrum with the Part 1 rules adopted in this proceeding. We believe that these proposals will assist our efforts to simplify and streamline our regulations in order to increase the overall efficiency of the competitive bidding process.

II. EXECUTIVE SUMMARY

3. This Third Report and Order is intended to establish a uniform set of provisions for all auctionable services, which incorporates our experience to date and allows us to conduct future auctions in a more consistent, efficient, and effective manner. More specifically, the Third Report and Order modifies and amends Subpart Q of Part 1 of the Commission's rules as follows:

Rules Governing Status as a Designated Entity

. Continues our practice of defining small business size standards on a service-specific basis so that we may take into account the characteristics and capital requirements of specific services in determining what size businesses should be eligible for bidding credits.

. Adopts, for all auctions in which special provisions are made for "designated entities" [FN5] of a certain business size, uniform definitions of "gross revenues" and "affiliate."

. Eliminates the use of installment payments for the 800 MHz Lower 80 and General Category channels services, and suspends the use of installment payments for other services to be auctioned in the immediate future. Indicates that the Commission intends to eliminate installment payments for the paging and 220 MHz services.

. Provides for higher bidding credits, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions. Adopts schedules of bidding credits for which designated entities qualify (although in service-specific rule making proceedings we will continue to establish the appropriate size standards for each auctionable service).

. Modifies the unjust enrichment rule, Section 1.2111(c), which governs the payment of unpaid principal and accrued interest by existing licensees utilizing installment payments who seek to transfer or assign their licenses, to conform with the broadband PCS rules. [FN6]

Rules Governing Auction Application and Payment Issues

. Amends Sections 1.2105(a) and 1.2107(c) to require that all short-form and long-form applications be filed electronically beginning January 1, 1999, if feasible. [FN7]

. Amends Section 1.2105(b)(2) to provide a uniform definition of major amendments to FCC Form 175.

. Creates general ownership disclosure requirements to eventually allow auction applicants to submit ownership information for one auction that will be stored in a central database and updated as necessary for subsequent auctions, instead of requiring resubmission of ownership information on each short-form and long-form application.

. Affirms our policy of refunding upfront payments before the end of the auction to bidders that lose eligibility to continue in the auction.

. Amends Section 1.2104(g) to apply uniform default rules to all auctionable services and all auction designs.

. Amends Sections 1.2109(a) and 1.2110(e) to permit auction winners who have submitted a timely down payment to submit their final payments on the licenses which they have won 10 business days after the applicable deadline, provided they also pay an appropriate late fee.

. Modifies our rules applicable to licensees currently paying for their licenses in installments to provide for one 90-day non-delinquency period and one automatic 90-day grace period, subsequent to the current 90-day non- delinquency period, and institutes a late payment fee on overdue installment payments, which is similar to that contained in our rules for the broadband PCS F block.

. Clarifies that we will not pursue a policy of cross default, either within or across services, where licenses default on an installment payment.

Rules Governing Competitive Bidding Design, Procedure and Timing Issues

. Clarifies that under its general delegated authority, the Wireless Telecommunications Bureau ("Bureau") may seek

comment on specific mechanisms relating to day-to-day auction conduct prior to the start, and during each auction, as required by the Balanced Budget Act of 1997. [FN8]

. Allows for "real time" bidding in simultaneous multiple-round auctions.

. Amends Section 1.2104, consistent with the Balanced Budget Act of 1997, to provide that the Bureau will seek comment on and specify a minimum opening bid and/or reserve price in future auctions, unless it determines that doing so is not in the public interest.

. Adopts for all auctionable services our broadband PCS rules governing bid withdrawal payments in the event of erroneous bids.

. Retains Section 1.2109(b) in its current form, which governs the Commission's options in the event a winning bidder defaults on its down payment.

. Modifies the attributable investor threshold of the anti-collusion rule, 47 C.F.R. § 1.2105(c), to include controlling interests and/or holders of a 10 percent or greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants who have applied to bid in the same markets.

. Permits all auction winners to begin construction of their systems, at their own risk, upon issuance of a public notice announcing auction winners.

In this Second Further Notice of Proposed Rule Making, we seek comment on a variety of additional proposals relating to our general competitive bidding rules. Specifically, we seek comment on:

. Whether there is a compelling governmental interest that would justify the use of provisions for minority-owned businesses and "exceedingly persuasive justification" for provisions for women-owned businesses.

. Whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

. How the Commission might offer an effective installment payment program, while minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to

the Commission) that have persuaded us to suspend the use of installment payments for now, and whether there are other provisions or mechanisms by which the Commission could encourage Section 309(j) designated entity participation in future auctions.

. Whether to adopt a controlling interest standard, whether such a standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, whether we should adopt our proposed rule, and whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals. We also seek comment on whether this proposed standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, we ask whether we should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether de facto control exists.

. Whether to supersede the competitive bidding rules previously adopted for GWCS with our Part 1 rules.

III. THIRD REPORT AND ORDER

A. Applicability of General Competitive Bidding Rules

4. Background. In the Notice, we proposed to apply the general competitive bidding rules adopted in this proceeding to all future auctions, to the extent possible. [FN9] In keeping with our goal of simplifying and streamlining the rule making process for all auctionable services, we sought comment on whether the rules adopted in this proceeding should supersede all existing, service-specific competitive bidding rules for future auctions. Specifically, we proposed that these rules would affect all services that are subject to pending proceedings [FN10] and any services that have existing competitive bidding rules that might apply to licenses that have not yet been auctioned or that will be

reauctioned. In the alternative, we sought comment on whether we should phase-in the applicability of the revised general competitive bidding rules, such that, at a minimum, initial auctions may be completed under the existing service-specific rules while later auctions in the same service would be conducted pursuant to the rules adopted in this proceeding.

[***]

102. Our rules provide that where a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower. [FN280] In the Competitive Bidding Fifth Report and Order, the Commission stated that where the default payment cannot be determined, the Commission may assess an initial default payment "of up to 20 percent" of the defaulting bidder's winning bid. [FN281] We adopt our proposal in the Notice to employ this practice for all auctionable services. No commenter addressed this issue. Although the Commission provided that this deposit amount will be up to 20 percent of the defaulted bid amount, we note that if a license is reauctioned for an amount greater than the defaulted bid for the license, the default payment due will be only three percent of the defaulted bid. [FN282] Thus, in the future we will assess an initial default deposit of between three percent (3%) and twenty percent (20%) of the defaulted bid amount where a winning bidder or licensee defaults and the defaulted license has yet to be reauctioned. Once the license has been reauctioned by the Commission and the total default payment can be determined, the Commission will either assess the balance of the appropriate default payment, or refund any amounts due, as necessary.

5. Installment Payments

a. Late Payments

103. Background. Section 1.2110(e)(4)(i) of our rules provides that if an entity paying for its licenses in installments is more than ninety (90) days delinquent in any payment it shall be in default. Section 1.2110(e)(4)(ii) provides that upon default or in anticipation of default on an installment payment, a licensee may request that the Commission grant a three- to six-month grace period, during which no installment payments need be made. [FN283] This rule states that in considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before; how far into the license term the default occurs; the reasons for default; whether the licensee has met construction build-out requirements; the licensee's financial condition; and whether the licensee is seeking a buyer under an authorized distress sale policy. [FN284] Under this rule, licensees are required to come before the Commission with a filing as well as financial information such as an income statement or balance sheet, in the case of financial distress, to provide the necessary information for the Commission to make its ruling. As a practical matter, licensees are then required to wait for a ruling by the Commission, or the Bureau on delegated authority, before knowing whether a grace period is granted or denied. In order to simplify these grace period procedures, we proposed to maintain our initial 90-day non-delinquency period, but to provide licensees with a subsequent automatic 90-day grace period in which to make their required payment without being considered in default.

104. We also proposed in the Notice to adopt a late payment fee schedule similar to that employed for the broadband PCS F block auction. Under this system, licensees that are late in their scheduled installment payments are assessed a late payment fee equal to five percent (5%) of the amount of the

past due payment. [FN285] Specifically, we proposed to require that licensees taking advantage of the initial 90-day non-delinquency period be assessed a late fee of five percent of the late payment, and that licensees taking advantage of the subsequent automatic 90-day grace period be assessed a late fee of 10 percent (10%) of the late payment. We further proposed that the consecutive 90-day non-delinquency and grace periods (e.g., a total of 180 days in which to submit the required payment) be automatic, so that in the future licensees would not be required to file a grace period request and wait for the Commission, or the Bureau on delegated authority, to render a decision.

105. Finally, we proposed in the Notice to modify the method by which interest that accrues is amortized when a licensee fails to make a required installment payment. Section 1.2110(e)(4)(ii) of our rules provides that interest that accrues during a grace period will be amortized over the remaining term of the license. [FN286] In the Notice, we recognized that amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden on the Commission by requiring formulation of a new amortization schedule. [FN287] In order to avoid the potential problems associated with changing the amount of installment payments, we proposed to amend Section 1.2110(e)(4)(ii) to require that all current licensees who avail themselves of the automatic grace period pay the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period.

106. Discussion. In order to add certainty to the installment payment process, we adopt our proposals from the Notice to modify our grace period provisions. As discussed above (see Section III.B.5, supra), we decline to use installment

payments for the immediate future as a means of financing small business participation in our auction program. As a result, our decision with regard to late payment fees for installment payments effectively will apply only to existing licensees who are currently paying for their licenses in installments. From this point forward, instead of considering individual grace period requests, the following system will apply: A licensee who does not make payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent, but will be assessed a five percent late payment fee as discussed above. If the licensee fails to make the required payment at the close of this first 90-day non-delinquency period, the licensee will automatically be provided a subsequent 90-day grace period, this time subject to a second, additional late fee equal to ten percent of the initial required payment.

107. As proposed in the Notice, under this system, licensees will not be required to submit a filing to take advantage of these provisions. [FN288] During this 90-to-180-day period, the Commission or its designated collection agent will continue to pursue collection of past-due installments and fees. [FN289] Also during this time, the licensee will have the opportunity to raise necessary capital, continue service and construction efforts, or seek a buyer for its license(s) that will resume payments. These late payment provisions will apply independently to all installment payments. Therefore, the late payment provisions and accompanying late fees will not affect the payment schedule for future payments. Thus, even if a licensee elects to take advantage of the late payment provisions, the licensee will still be responsible for remitting all future installment payments in a timely manner, unless the licensee elects to take advantage of the late payment provisions for any future installment payment. The following example illustrates how this system will operate:

ABC Corp. has a $100,000 installment interest payment due on March 1. If ABC Corp. is able to make its payment on March 1, then it must remit $100,000 to the Commission. If ABC Corp. makes its payment anytime from March 2 until

May 30 (the end of the non-delinquency period), then ABC Corp. must remit $105,000 to the Commission to be considered current on its March 1 installment payment. If ABC Corp. does not make its March 1 payment by May 30, then it must remit $115,000 on or before August 28. If ABC Corp. does not remit the required $115,000 by August 29 (the end of the 90-day grace period), then it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. [FN290]

ABC Company's June 1 installment payment of $100,000 remains due on June 1 regardless of the payment status of the March 1 payment. The late payment terms apply to June installment payment independently of the March payment. Thus, if ABC Company does not make its March 1 payment until June 1, the total amount due to the Commission on June 1 is $215,000 which consists of the March payment, the March 5% non-delinquency late fee, the March 10% grace period late fee and the June payment. Assuming the licensee remits the March 1 payment and accompanying March late fees of $115,000 to the Commission by August 29, then the total amount due to the Commission on September 1 will be $215,000 which consists of the June installment payment of $100,000, the June 5% non-delinquency late fee, the June 10% grace period late fee and September installment payment of $100,000.

ABC Company may elect to make late payments and pay the accompanying late fees on the March and June payments. However, ABC Company must remit $115,00 representing the required March payment and accompanying March late fees by August 29 (the end of March's 90-day grace period) or it will be considered in default and its license will automatically cancel on August 30 without further action by the Commission. Furthermore, ABC Company must remit and additional $115,000 representing the required June payment and accompanying June late fees by November 29 (the end of June's 90-day grace period) or it will be considered in default and its license will automatically cancel on November 30 without further action by the Commission.

As we proposed in the Notice, the late fees we adopt will accrue on the next business day following the payment due

date and will be payable with the next quarterly installment payment obligation. We emphasize that at the close of non-delinquency or grace period, a licensee must submit the required late fee(s), all interest accrued during the non-delinquency period, and the appropriate scheduled payment with the first payment made following the conclusion of the non-delinquency period or grace period. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. As part of our spectrum management responsibilities, we wish to ensure that spectrum is put to use as soon as possible. We also believe that licensees should be working to obtain the funds necessary to meet their payment obligations before they are due and, accordingly, that the non-delinquency and grace periods we adopt should be used only in extraordinary circumstances. Thus, as we emphasized in the Notice, a licensee who fails to make payment within 180 days sufficient to pay the late fees, interest, and principal, will be deemed to have failed to make full payment on its obligation and will be subject to license cancellation pursuant to Section 1.2104(g)(2) of the Commission's rules.

108. Several commenters support our efforts to provide licensees with predetermined non-delinquency periods without requiring the submission of a formal grace period request. [FN291] In addition, many of the commenters addressing this issue, including AMTA, Hughes, AirTouch, Mountain Solutions and CII support the imposition of a late payment fee similar to that imposed in the broadband F block auction, in order to create a significant incentive for timely payment of installment obligations. [FN292] CII believes that modifying our current grace period procedures will provide licensees with knowledge in advance of the extent of any relief that will be forthcoming from the Commission to a licensee who misses an installment payment. [FN293] AirTouch believes that any licensee who fails to make payment within 180 days should face the automatic

cancellation of its license. AirTouch contends that once a certain number of installment payments have been submitted late, the Commission should declare the licensee in default and subject to the default payments proposed in the Notice. [FN294] In contrast, only CIRI opposes this liberalization of the current grace period rules, requesting instead that grace period relief be made available only when a licensee can demonstrate that such relief is warranted and the public debt will ultimately be satisfied. [FN295] Although Hughes recommends the imposition of a "significant" late fee to the extent that an applicant misses a payment deadline, Hughes believes that a five to ten percent late fee is large enough to discourage late payments and to ensure that the government is compensated for its administrative expenses in recouping the payment. [FN296] As an alternative to our proposal in the Notice, GWI proposes that any such late payment fee should be pro-rated over the 90 day payment period instead of accruing all at once regardless of when the late payment is made, in order to provide an economic incentive for licensees who are overdue in their payment obligations to retire the payment quickly instead of waiting until the end of the payment period. In addition, GWI suggests that such a pro-rated payment is fairer to licensees who inadvertently miss a required payment through administrative error or other unavoidable, unforeseen circumstances. [FN297]

109. As an alternative to our proposals in the Notice, Airadigm contends that following the first 90-day non-delinquency period, licensees should be given a second 90-day period with a five percent late fee, followed by a third 90-day grace period with a 10 percent late fee. [FN298] ISTA believes that a rule whereby any license is cancelled at the close of the second 90-day grace period is draconian, and that such a "hard-and-fast" automatic cancellation rule would doom many small businesses. [FN299] GWI opposes the imposition of an additional 10 percent late payment fee where licensees require an additional 90-day late payment period. [FN300] We decline to adopt these alternate proposals. As we indicated in the Notice, the grant of a grace period is an extraordinary remedy and we wish to encourage

licensees to seek private market solutions to their capital problems before the payment due date. In this regard, we note that the Commission has an obligation under the Debt Collection Improvement Act ("DCIA") to enforce payment obligations owed to the federal government. [FN301]

110. We believe that the automatic grace period provisions we adopt today provide licensees with adequate financial incentives to make installment payments on time, while at the same time creating increased certainty that will help licensees pursue private market solutions to their financing difficulties. These provisions also will discourage licensees from attempting to maximize their cash flow at the government's expense by submitting a required installment payment after it is due. Several commenters agree with this assessment. [FN302] At the same time, these provisions will eliminate uncertainty for many licensees who are seeking to restructure other debt contingent upon the results of the Commission's installment payment provisions. In addition, this system will ease the burden on the Commission of considering individual grace period requests where Commission or its designee may not have the necessary resources to evaluate a licensee's financial condition, business plans, and capital structure proposals. We recognize that some commenters oppose the imposition of a late fee on overdue installment payment, [FN303] and in particular on the 90-day non-delinquency period. [FN304] However, this approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates. [FN305] This approach also is consistent with the provisions of the DCIA, which requires that the Commission notify the Secretary of the Treasury and commence debt collection procedures where a party is more than 180 days past due on any outstanding debt owed to a federal agency. [FN306]

111. We recognize that a number of commenters oppose the application of these provisions to current licensees. [FN307] In particular, GWI and IVDS Enterprises argue that to the

extent the Commission adopts a late payment fee, it should limit the imposition of such a fee to licenses issued in future auctions. [FN308] However, our recent experience with the installment payment program has shown the importance of ensuring that all licensees, including current licensees, have adequate financial incentives to make installment payments on time. We also note that in awarding licenses in the past to entities choosing to pay in installments, the Commission has emphasized that the terms of the installment payment program will be governed by current Commission rules and regulations, as amended. For example, in awarding licenses to C block licensees paying for their licenses in installments, the Commission indicated in the associated "Note and Security Agreement" that the terms of the installment plan would be governed by and construed in accordance with then-applicable Commission orders and regulations, as amended. We also believe that these licensees should obtain the benefit of increased certainty that provisions for automatic grace periods provide. This decision is supported by Mountain Solutions, who requests that current licensees obtain the benefits of any loosening of the late payment fee and grace period rules. [FN309]

112. As provided in the Second Report and Order and Further Notice of Proposed Rule Making, installment payments for C and F block licensees will resume effective March 31, 1998. Under our decision to reinstate installment payments for these licensees, we provided them with one automatic 60-day non- delinquency period following the March 31, 1998, deadline, during which time they will not be considered delinquent in their payment obligations. As we indicated in the Second Report and Order and Further Notice of Proposed Rule Making, we will not entertain any requests for extension of the March 31, 1998 deadline beyond an automatic 60-day non-delinquency period, so that for C and F block licensees all required payments must be submitted no later than May 30, 1998. Only those licensees making a timely payment of all amounts due, as set forth in the Second Report and Order will be permitted to take advantage of the late payment provisions we adopt today. [FN310]

113. In commenting on these modifications to the grace period provisions, CIRI also proposes that the Commission make public the terms of any workouts or debt relief provided to licensees. [FN311] CIRI notes that parties may request confidential treatment of sensitive financial information pursuant to Section 0.459 of the Commission's rules, and that such confidential treatment should be sufficient to safeguard the privacy interests of licensees, while still making the terms of any workout available for public scrutiny. [FN312] As an initial matter, because we adopt our proposals providing for automatic grace periods, we do not envision licensees filing grace period requests under normal circumstances from this point forward. As a result, we believe that CIRI's concerns about the Commission making public a licensee's request for grace period relief are moot. Moreover, because from this point forward a licensee's taking advantage of our late payment provisions will be an administrative matter processed by the Commission's loan servicer, and not a formal waiver request, aside from instances where a licensee is declared in default, there will be no public notice of a licensee's payment status. The license is cancelled automatically under such circumstances. In contrast, for licensees who have previously filed grace period requests consistent with our current rules and procedures, we will continue our current practice of making the request public when a decision is released granting or denying the request, except to the extent that any request by the licensee for confidential treatment is granted pursuant to Section 0.459 of the Commission's rules. [FN313] We further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests. Licensees whose requests for a grace period are denied will have ten (10) business days to make the required payment or be considered in default.

b. Defaults on Installment Payments

114. Background. In the Notice, we tentatively concluded that licensees that default on installment payment obligations

should be subject to the default payment provisions outlined in Section 1.2104(g) (i.e., the difference between the defaulting winner's bid and the subsequent winning bid plus 3 percent of the lesser of these amounts). Sections 1.2110(e)(1) and 1.2110(e)(2) of our rules provide that applicants eligible for installment payments will be liable for such a payment if they fail to remit either their initial or final down payment. [FN314] Section 1.2110(e)(4)(iii) provides that (1) following the expiration of any grace period without successful resumption of payment, (2) upon denial of a grace period request, or (3) upon default with no such request submitted, the license of an entity paying on an installment basis will be cancelled automatically and the Commission will initiate debt collection procedures pursuant to Federal Claims Collection Standards and applicable laws. [FN315] This section of our rules does not clearly indicate, however, whether under these circumstances the licensee will be liable for the default payment set forth in Section 1.2104(g).

115. Discussion. We do not adopt our tentative conclusion to apply the default provisions of Section 1.2104(g) to licensees who default on an installment payment. Most commenters addressing the issue oppose this proposal. [FN316] For example, Pocket submits that default payments assessed later in the license term become highly arbitrary and unduly burdensome. Pocket also contends that such payments are greater than those traditionally required for secured creditors and create substantial disincentives for investors and creditors who might otherwise be interested in providing financing for licensees. [FN317] Pocket also notes that any default payment assessed disadvantages a licensee's other creditors, which also makes it more difficult for licensees to raise capital. [FN318] Finally, Pocket states that default payments assessed later in the license term have no deterrent effect as there is no basis to believe that licensees that have paid substantial sums to the Treasury will willingly default. [FN319] In contrast, AirTouch supports our tentative conclusion that licensees that ultimately fail to fulfill their installment payment obligations despite the availability of a 90-day non- delinquency period and a subsequent, automatic

90-day grace period, should be declared in default, and in turn be made subject to the default payments proposed in the Notice. [FN320]

116. We have considered the comments of those who oppose the proposed assessment, and find that an additional payment requirement for licensees defaulting on installments is not necessary to achieve our stated objectives. Our current rules and installment payment terms are adequate to discourage defaults and encourage licensees to find private market solutions when they face financial difficulties. We also believe that the rules we adopt today providing for a 90-day non-delinquency period followed by a subsequent, automatic 90-day grace period, subject to appropriate late fees of five percent for the 90-day non-delinquency period and 10% for automatic 90-day grace period, payable at the conclusion of these periods serve these goals without substantially risking delays or disruption in service to the public. In particular, we believe that this certainty regarding the Commission's treatment of licensees needing extra time to make their installment payments will increase the likelihood that licensees and potential investors will find solutions to capital problems before a default occurs. The risk of losing its license should provide a licensee a strong incentive to avoid default. If, however, a default does occur, the conditions on the face of each license and the terms of the notes and security agreements executed by licensees provide the Commission appropriate remedies that will ensure that defaulted licenses are returned to the Commission for reauction and that all outstanding debts, as well as the Commission's costs, are recoverable.

[***]

V. CONCLUSION

195. Based on the experience we have gained from our 15 completed auctions, as well as the feedback we have received from bidders, we believe the time has come to streamline our

competitive bidding rules in order to make our licensing process more efficient. In the past, we have adjusted our auction procedures for different services as we gained experience with the process, resulting in the adoption of different procedures for different auctionable services. This Third Report and Order amends Subpart Q of Part 1 of the Commission's rules [FN523] to reflect substantive amendments and modifications intended to simplify these regulations, supersede unnecessary rules wherever possible, and eliminate the need to conduct separate, comprehensive rule making proceedings prior to each auction. We believe that the rules we adopt today will benefit bidders and the auction process generally. We also believe these rules will help to provide more specific guidance and flexibility on a number of issues that will increase the overall effectiveness of our auctions. This Second Further Notice of Proposed Rule Making seeks comment on additional issues relating to our general competitive bidding rules for all auctionable services. We believe that these proposals will further enable us to achieve our goals of simplifying and streamlining our regulations in order to increase the overall efficiency of the competitive bidding process.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Act

196. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix B.

197. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix C. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial

Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the Second Further Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Second Further Notice of Proposed Rulemaking, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

B. Ex Parte Presentations

198. This Second Further Notice of Proposed Rule Making is a permit but disclose notice and comment rule making proceeding. Ex parte presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comments

199. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 6, 1998, and reply comments on or before February 17, 1998. In addition, a courtesy copy should be delivered to Josh Roland and Ken Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC

20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

D. Additional Information

200. For further information concerning the Third Report and Order and Second Further Notice of Proposed Rule Making, contact Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418- 0660.

E. Ordering Clauses

201. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this Third Report and Order and Second Further Notice of Proposed Rule Making is hereby ADOPTED, and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix D, effective 60 days after publication in the Federal Register. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register,

following OMB approval, unless a notice is published in the Federal Register stating otherwise.

202. IT IS FURTHER ORDERED THAT pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § § 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

203. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this Third Report and Order and Further Notice of Proposed Rule Making, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § § 601 et seq.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2360, ¶ 68 (1994) ("Competitive Bidding Second Report and Order "), on recon., Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) ("Competitive Bidding Second Memorandum Opinion and Order").

FN2. 47 C.F.R. § § 1.2101 et seq.

FN3. See 47 C.F.R. § § 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. § § 24.701-720 (broadband PCS); 47 C.F.R. § § 90.901-90.913 (800 and 900 Specialized Mobile Radio (SMR)); 47 C.F.R. § 95.816 (Interactive Video and Data Service (IVDS)); 47 C.F.R. § § 100.71- 100.80 (Direct Broadcast Satellite (DBS)); 47 C.F.R. § § 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R. § § 22.960-967 (Cellular Unserved); 47 C.F.R. § § 25.101-531 (Digital Audio Radio Service (DARS); 47 C.F.R. § § 27.1-27.325 (Wireless Communications Services (WCS)).

FN4. The Commission received 24 comments and 19 reply comments in response to Amendment of Part 1 of the Commissions Rules – Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket 97-82, 12 FCC Rcd 5686 (1997) ("Notice"). Appendix A contains a list of full and abbreviated names of parties commenting parties. In addition, Appendix A contains a list of parties filing comments, reply comments and ex parte comments in response to a public notice seeking comment in this docket, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," Public Notice, DA 97-82 (rel. June 2, 1997) ("Installment Payment Public Notice").

FN5. See 47 C.F.R. § 1.2110(a). The Commission's rules define designated entities as small businesses, businesses owned by women or members of minority groups, and rural telephone companies. See also 47 U.S.C. § § 309(j)(4)(C), (D). After the Supreme Court's decision in Adarand Constructors v. Pena that federal measures awarding preferential treatment on the basis of race are subject to strict scrutiny, the Commission revised its designated entity provisions so that all designated entities must be small businesses. See Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995).

FN6. See 47 C.F.R. § § 24.716(d), 24.717(c).

FN7. Sections 1.2105(a) and 1.2107(c) were erroneously amended by the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making in this docket. The Notice portion of the Order, Memorandum Opinion and Order and Notice of Proposed Rule Making only requested comment on these proposed amendments to the Commission's rules; the Commission did not intend to adopt the rule at that time. See Notice at ¶ 46.

FN8. Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997), to be codified in relevant part at 47 U.S.C. § 309(j)(2)(E) and 309(j)(4)(F) ("Balanced Budget Act").

FN9. Notice at ¶ 18.

FN10. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding - Tenth Report and Order, PP Docket No. 93-253, 11 FCC Rcd 19974 (1996) (Interactive Video and Data Service (IVDS)); Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 2732 (1997) ("Paging Second Report and Order and Further Notice of Proposed Rule Making") (Paging); Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5- 29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services – Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-

297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making (rel. March 13, 1997) ("LMDS Second Report and Order") (Local Multipoint Distribution Service (LMDS)); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Memorandum Opinion and Order on Reconsideration, FCC 97-224 (rel. July 10, 1997) ("800 MHz Memorandum Opinion and Order and Order on Reconsideration"), 11 FCC Rcd 22114 (1996) (800 MHz SMR).

FN280. See 47 C.F.R. § 1.2104(g)(2).

FN281. See Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5563, n. 51; Public Notice, "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," DA 96-481 (April 6, 1996). See also CHPCS, Inc., BTA No. B347, Frequency Block C, Order, DA 96-1825 (rel. November 4, 1996) (assessing an initial default deposit equal to three percent of the total default payment).

FN282. 47 C.F.R. § 24.704(a)(2). See also 47 C.F.R. § 1.2104(g).

FN283. 47 C.F.R. § 1.2110(e)(4)(ii).

FN284. Id.

FN285. 47 C.F.R. § 24.716(c).

FN286. 47 C.F.R. § 1.2110(e)(4)(ii).

FN287. See also, Second Report and Order and Further Notice of Proposed Rule Making, which provides for the payment of interest accrued during the period in which installment payments were suspended over eight quarterly payments. Second Report and Order and Further Notice of Proposed Rule Making at ¶ 27.

FN288. We further note that the late fee is to be paid at the time the regular quarterly installment payment is made.

FN289. See Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

FN290. See 47 C.F.R. § 1.2110(e)(4)(iii).

FN291. See AMTA Comments at 12-13; CII Comments at 16; Pocket Comments at 7-8; Airtouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

FN292. See AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8; Mountain Solutions Comments at 3, CII Comments at 16.

FN293. CII Comments at 16.

FN294. AirTouch Comments at 8-9.

FN295. CIRI Comments at 14 and Reply Comments at 2-3.

FN296. Id.

FN297. GWI Reply Comments at 8.

FN298. Airadigm Reply Comments at 2.

FN299. ISTA Reply Comments at 7.

FN300. GWI Reply Comments at 9.

FN301. See Debt Collection Improvement Act, Pub. L. No. 104-134, § 3100(i)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3711(a).

FN302. See, e.g., AMTA Comments at 13; Hughes Comments at 8; AirTouch Comments at 8.

FN303. ISTA Comments at 1 and Reply Comments at 4-5; IVDS Enterprises Reply Comments at 3; Pocket Comments at 7-8; Merlin Reply Comments at 4.

FN304. Airadigm Comments at 14; IVDS Enterprises Reply Comments at 1-2.

FN305. See, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property, at § 4.02(iii) (1989).

FN306. See 31 C.F.R. § 3711(g)(1).

FN307. See Mountain Solutions Reply Comments at 5-6; GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

FN308. GWI Reply Comments at 7; IVDS Enterprises Reply Comments at 4.

FN309. Mountain Solutions Reply Comments at 5-6.

FN310. See 47 C.F.R. § 1.2110.

FN311. CIRI Reply Comments at 3.

FN312. Id. at 4.

FN313. See 47 C.F.R. § 0.459. We note that several PCS C and F block licensees have filed requests for an extension of the deadline for making payments with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in a manner consistent with the procedures we have outlined.

FN314. 47 C.F.R. § § 1.1220(e)(i) and 1.2110(e)(2).

FN315. 47 C.F.R. § 1.2110(e)(4)(iii); see 47 C.F.R. Part I, Subpart O, 4 C.F.R. Parts 101-105, and 31 U.S.C. § § 3701 et seq.

FN316. See, e.g., Airadigm Comments at 16; Pocket Comments at 9.

FN317. Pocket Comments at 9.

FN318. Id.

FN319. Pocket Comments at 10.

FN320. AirTouch Comments at 8-9.

FN523. 47 C.F.R. § § 1.2101 et seq.

APPENDIX A

List of Parties

I. Comments in Response to the Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making

Parties Filing Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC

Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc. and Euphemia Banas

("Airadigm")

AirTouch Paging, Inc. ("AirTouch")

Alarm Industry Communications Committee ("AICC")

American Automobile Association ("AAA")

American Mobile Telecommunications Association, Inc. (AMTA)

AT&T Wireless Services, Inc. ("AT&T")

Automated Credit Exchange ("ACE")

Cellular Telecommunications Industry Association ("CTIA")

Compu-DAWN, Inc. ("Compu-DAWN")

Cook Inlet Region, Inc. ("CIRI")

Coalition of Institutional Investors: Fleet Equity Partners, Media/Communications Partners,

OneLiberty Ventures and Spectrum Equity Associates ("CII")

Hughes Electronic Corporation ("Hughes")

Interactive Video Data Trade Association ("ISTA")

Merlin Telecom, Inc. ("Merlin")

Metrocall, Inc. ("Metrocall")

Motorola, Inc. ("Motorola")

Mountain Solutions, Ltd. ("Mountain Solutions")

National Telephone Cooperative Association ("NTCA")

Nextel Communications, Inc. ("Nextel")

Paging Network, Inc. ("PageNet")

Personal Communications Industry Association ("PCIA")

Pocket Communications, Inc. ("Pocket")

Western Wireless Corporation ("WWC")

Parties Filing Reply Comments

Airadigm Communications, Inc., Loli, Inc., New Wave Communications, Inc., KMC

Interactive TV, Inc., MAR IVDS, Inc., New Wave PCS, Inc., and Euphemia Banas

("Airadigm")

AirTouch Paging, Inc. ("AirTouch")

Alarm Industry Communications Committee ("AICC")

American Automobile Association ("AAA")

CellNet Data Systems, Inc. ("CellNet")

Cook Inlet Region, Inc. ("CIRI")

Ericsson, Inc. ("Ericsson")

U.S. Federal Trade Commission, Bureau of Consumer Protection ("FTC")

General Wireless, Inc. ("GWI")

Interactive Video Data Trade Association ("ISTA")

IVDS Enterprises, Joint Venture ("IVDS Enterprises")

Merlin Telecom, Inc. ("Merlin")

Mountain Solutions, Ltd. ("Mountain Solutions")

Narrowband PCS Companies ("NPCS")

Nextel Communications, Inc. ("Nextel")

NextWave Telecom, Inc. ("NextWave")

Omnipoint Corporation ("Omnipoint")

The Rural Telecommunications Group ("RTG")

Western Wireless Corporation ("WWC")

II. Comments in Response to the Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," WT Docket 97-82, DA 97-697 (rel. June 2, 1997)

Parties Filing Comments

Airadigm Communications, Inc. (Airadigm)

ALLTEL Communications, Inc. (ALLTEL)

Alpine PCS, Inc. (Alpine)

AmeriCall International, L.L.C. (AmeriCall)

Bay Springs Telephone Company, Inc. (Bay Springs)

Bear Stearns

BellSouth Corporation

BIA Capital Corporation (BIA Capital)

Brookings Municipal Utilities (BMU)

Central Wireless Partnership (CWP)

Chase Telecommunications, Inc. (Chase)

ClearComm, L.P.

Comcast Corporation

Community Service Communications, Inc. (CSCI)

ComScape Telecommunications of Charleston License, Inc. (ComScape)

Conestoga Wireless Company (Conestoga)

CONXUS Communications, Inc. (CONXUS)

Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless

Corporation AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and

Airadigm Communications, Inc. (collectively, CIRI)

Creative Airtime Services, L.L.C. (Creative)

Cyber Sites, L.L.C.

Dewey Ballantine

DiGiPH PCS, Inc. (DiGiPH)

Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)

Eldorado Communications, L.L.C. (Eldorado)

Fortunet Communications, L.P. (Fortunet)

General Wireless Inc. (GWI)

Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)

Horizon Personal Communications, Inc. (Horizon)

Indus, Inc.

Integrated Communications Group (Integrated)

Kansas Personal Communications Services, Ltd. (KPCS)

Ken W. Bray

Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)

MCI Communications Corporation (MCI)

Meretel Communications Limited Partnership (Meretel)

MFRI, Inc.

Morris Communications, Inc. (Morris)

National Wireless Resellers Association (NWRA)

National Association of Black-Owned Broadcasters, Inc. (NABOB)

National Association of Black Telecommunications Professionals, Inc. (NABTP)

National Telephone Cooperative Association (NTCA)

Nextel Communications, Inc. (Nextel)

NextWave Telecom, Inc. (NextWave)

Northcoast Communications, L.L.C. (Northcoast)

Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)

Omnipoint Corporation

OneStop Wireless

OnQue Communications, Inc. (OnQue)

PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)

Pioneer Telephone Association, Inc. (Pioneer)

Pocket Communications, Inc. (Pocket)

Point Enterprises, Inc. (Point)

R&S PCS, Inc. (R&S)

RFW, Inc.

Rural Telephone Finance Corporation (RTFC)

Small Business Coalition (SBC)

SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)

Southwestern Bell Mobile Systems (SBMS)

Spectrum Watch

Sprint Spectrum L.P.

Sprint Corporation

Tennessee L.P. 121 (Tennessee)

Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)

Urban Communicators PCS Limited Partnership (Urban Comm)

Parties Filing Reply Comments

Airtel Communications, Inc. (Airtel)

ALLTEL

Alpine

American Mobile Telecommunications Association, Inc. (AMTA)

Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)

BellSouth Corporation

Carlson Technologies, Inc. (Carlson)

Cellexis International, Inc. (Cellexis)

ClearComm, L.P.

Comcast Corporation

Conestoga

CONXUS

CIRI

Duluth PCS

Fortunet

GWI

GTE Service Corporation (GTE)

Ken W. Bray

MCI

Millison Investment Management, Inc. (MIM)

Mountain Solutions LTD, Inc. (Mountain Solutions)

Nextel

NextWave

Northcoast

Omnipoint Corporation

OnQue

PCS Wisconsin, LLC

PrimeCo Personal Communications, L.P. (PrimeCo)

Radiofone PCS, L.L.C. (Radiofone)

R&S

RTFC

Sprint Spectrum L.P.

Stan P. Doyle

Telecommunications Resellers Association (TRA)

UniDial Communications (UniDial)

Urban Comm

U.S. Airwaves, Inc.

Wireless Nation, Inc.

Parties Filing Ex Parte Comments

AirGate Wireless, July 18, 1997

AirGate Wireless, July 22, 1997

AirGate Wireless, September 9, 1997

Alpine, September 17, 1997

Alpine, September 23, 1997

AmeriCall, July 11, 1997

AmeriCall, August 5, 1997

AmeriCall and Hughes Network Systems, Inc., September 16, 1997

AmeriCall, ClearComm, and Chase, September 17, 1997

BIA Capital, August 4, 1997

Chase, August 11, 1997

ClearComm, August 7, 1997

Congressman Rick Boucher, July 25, 1997

Congressman Richard Burr, August 11, 1997

Congressman Thomas Davis, July 30, 1997

Congressman John D. Dingell, September 16, 1997

Congressman Steny H. Hoyer, August 7, 1997

Congresswoman Sue W. Kelly, August 11, 1997

Congressman W.J. "Billy" Tauzin, August 13, 1997

Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997

CONXUS, August 27, 1997

Cook Inlet Communications, August 5, 1997

Cook Inlet Communications, August 15, 1997

Cook Inlet Region, Inc., September 23, 1997

El Dorado, August 13, 1997

GWI, August 4, 1997

GWI, August 15, 1997

GWI, August 18, 1997

Magnacom Wireless, LLC, August 13, 1997

MCI, August 14, 1997

NextWave, June 23, 1997

NextWave, July 29, 1997

NextWave, August 5, 1997

Nokia, September 15, 1997

Nokia, September 16, 1997

Northern Michigan PCS Consortium, L.L.C., August 14, 1997

Omnipoint Corporation, August 18, 1997

Omnipoint Corporation, September 3, 1997

Omnipoint Corporation, September 5, 1997

Omnipoint Corporation, September 23, 1997

R&S, August 11, 1997

Senator Christoper S. Bond, July 14, 1997

Senator Paul D. Coverdell, September 24, 1997

Senator Pete V. Domenici, September 10, 1997

Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997

Senator John McCain, August 19, 1997

Senator John McCain, September 18, 1997

Senator Daniel Patrick Moynihan, August 4, 1997

Triumph Capital, August 7, 1997

Triumph Capital, September 23, 1997 ("McCarthy Letter")

Urban Comm, August 21, 1997

Urban Comm, September 17, 1997

U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

III. Comments in Response to the Wireless Telecommunications Bureau's Public Notice, "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," DA 97-1152 (rel. June 2, 1997).

Parties Filing Comments

Airadigm Communications, Inc. ("Airadigm")

Comscape Telecommunications of Charleston License, Inc. ("ComScape")

DiGiPH PCS, Inc. ("DiGiPH")

Eldorado Communications, L.L.C., KMtel L.L.C., Mercury PCS L.L.C., and Miccom Associates ("Eldorado")

Fortunet Communication, L.P.("Fortunet")

Indus, Inc, and Chase Telecommunications, Inc. ("Indus and ChaseTel")

Integrated Communications Group Corporation ("Integrated")

Kansas Personal Communication Services, Inc. ("KPCS")

Vincent D. McBride ("McBride")

Morris Communications, Inc. ("Morris")

National Association of Black-Owned Broadcasters, Inc. ("NABOB")

National Telephone Cooperative Association ("NTCA")

NextWave Telecom, Inc. ("NextWave")

Pinnacle Telecom, L.P. ("Pinnacle")

Pioneer Telephone Association, Inc. ("Pioneer")

Rural Telephone Finance Cooperative ("RTFC")

September 17 Alliance ("Alliance")

Sprint Spectrum, L.P. ("Sprint")

Urban Communicators PCS Limited Partnership ("Urban Comm")

Quantum Communications Group, Inc. ("Quantum")

Wireless 2000, Inc., Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership ("Wireless 2000")

Parties Filing Reply Comments

Omnipoint Corporation ("Omnipoint")

Savannah Independent PCS Corporation, Brookings Municipal Utilities, PVT Wireless Limited Partnership, PCS Plus, L.L.C., Southwestern Minnesota PCS Limited Partnership, Western Minnesota PCS Limited Partnership, North Dakota PCS Limited Partnership, and Horizon Personal Communications, Inc. ("Joint C block Applicants").

[***]

APPENDIX D

Final Rules

Parts 1, 21, 24, 27, 90 and 95 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2101 is revised to read as follows:

§ 1.2101 Purpose.

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66) and the Balanced Budget Act of 1997 (Public Law 105-33), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

3. Section 1.2102 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) Mutually exclusive initial applications are subject to

competitive bidding.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that

(i) Are used to protect the safety of life, health, or property; and

(ii) Are not commercially available to the public;

(2) Initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(3) Noncommercial educational and public broadcast stations described under 47 U.S.C. § 397(6).

Note to § 1.2102: To determine the rules that apply to competitive bidding, specific service rules should also be consulted.

4. Section 1.2103 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 1.2103 Competitive bidding design options.

(a) The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

(1) Simultaneous multiple-round auctions (using remote or on-site electronic bidding);

(2) Sequential multiple round auctions (using either oral

ascending or remote and/or on-site electronic bidding);

(3) Sequential or simultaneous single-round auctions (using either sealed paper or remote and/or on-site electronic bidding); and

(4) Combinatorial (package/contingent) bidding auctions.

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(d) The Commission may use real time bidding in all electronic auction designs.

3. Section 1.2104 is amended by revising paragraphs (d) and (g) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

*****

(d) Minimum Bid Increments, Minimum Opening Bids and Maximum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission also may establish minimum opening bids and maximum bid increments on a service-specific basis.

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(g) Withdrawal, Default and Disqualification Payment. As specified below, when the Commission conducts an auction pursuant to § 1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. The bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1), the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

*****

4. Section 1.2105 is revised to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by Public Notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership information, as set forth in § 1.2112.

(iii) The identity of the person(s) authorized to make or

withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to § 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids,

bidding strategies or the particular licenses on which they will or will not bid;

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Short-Form Application (FCC Form 175). (1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short- form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short- form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) Prohibition of collusion. (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before of during an auction, provided such changes do no result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

(4) After the filing of short-form applications, a holder of a non- controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) the attributable interest holder certifies to the Commission that it has not communicated and will not

communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term "applicant" shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) the term "bids or bidding strategies" shall include capital calls or requests for additional funds in support of bids or bidding strategies.

EXAMPLE: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the

Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

5. Section 1.2107 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2107 Submission of down payment and filing of long-form applications.

*****

(b) Unless otherwise specified by Public Notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by Public Notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be

returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in § 1.2104.

*****

6. Section 1.2108 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1.2108 Procedures for filing petitions to deny against long-form applications.

*****

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny

such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

*****

7. Section 1.2109 is amended by revising paragraphs (a), (b) and (c) to read as follows:

§ 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified by Public Notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.

When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in § 1.2104(g)(2). In such event, the Commission, at its discretion, may either re- auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in § 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

*****

8. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

*****

(b) ***

(3) Rural telephone companies. A rural telephone company is any local exchange carrier operating entity to the extent that such entity –

(i) provides common carrier service to any local exchange carrier study area that does not include either

(A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or

(B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(4) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity–

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a

concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step- father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross

revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a point venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be

construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Size of bidding credits. A winning bidder that qualifies

as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years 3 years not exceeding $3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years 3 years not exceeding $15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years 3 years not exceeding $40 million are eligible for bidding credits of 15 percent.

(f) Installment payments. The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified by Public Notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay default payments pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due

payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

(g) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

(l) Audits.

(1) Applicants and licensees claiming eligibility under this section shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding FCC-licensed service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(m) Gross Revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of

the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

9. Section 1.2111 is amended by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 1.2111 Assignment or transfer of control: unjust enrichment.

*****

(c) Unjust Enrichment Payment: installment financing.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing

eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

(d) Unjust enrichment payment: bidding credits.

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer.

(2) Payment Schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, or ownership change.

(e) Unjust Enrichment: Partitioning and Disaggregation.

(1) Installment Payments. Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding Credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning

unjust enrichment as set forth in this section.

(3) Apportioning Unjust Enrichment Payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

10. Section 1.2112 is added to read as follows:

§ 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;

(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in

the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in § 1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

11. Section 1.2113 is added to read as follows:

Sec. 1.2113Construction prior to grant of application.

Subject to the provisions of this section, applicants for licenses awarded by competitive bidding may construct facilities to provide service prior to grant of their applications, but must not operate such facilities until the FCC grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities for licenses subject to competitive bidding.

(a) When applicants may begin construction. An applicant may begin construction of a facility upon release of the

Public Notice listing the post- auction long-form application for that facility as acceptable for filing.

(b) Notification to stop. If the FCC for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) Assumption of risk. Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing Public Notices;

(3) Having to alter, relocate or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or FCC rules and orders.

(d) Conditions. Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application does not include a request for a waiver of one or more FCC rules;

(2) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325;

(3) The applicant has indicated in the application that the

proposed facility would not have a significant environmental effect, in accordance with § § 1.1301 through 1.1319;

(4) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required; and

(5) Any service-specific restrictions not listed herein.

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 403, 404, 410, 602, 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554, unless otherwise noted.

2. Section 21.959(a)(2) is revised to read as follows:

§ 21.959 Withdrawal, default and disqualification.

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(a) ***

(2) Default or disqualification after close of auction. See § 1.2104 (g)(2) of this chapter.

*****

3. Section 21.960(b)(4) and (d)(1) are revised to read as follows:

§ 21.960 Designated entity provisions for MDS.

*****

(b) ***

(4) Conditions and obligations. See § 1.2110(f)(4) of this chapter.

*****

(d) ***

(1) Unjust enrichment. See § 1.2111 of this chapter.

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PART 24 - PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. Section 24.304(a)(2) is revised to read as follows:

§ 24.304 Withdrawal, default and disqualification penalties.

(a) ***

(2) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

*****

3. Section 24.309 is amended by revising paragraphs (b) and (f) to read as follows:

§ 24.309 Designated entities

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(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments.

(i) Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bids on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in § 1.2110(g) of this chapter.

(ii) Businesses owned by members of minority groups and women that are winning bidders for the regional licenses indicated by an (**) in § 24.129 may pay the full amount of their winning bids (less the applicable bidding credit and down payment) in installments with

(A) Interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent;

(B) Interest-only payments for the first two years; and

(C) Principal and interest payments amortized over the remaining eight years of the license.

(2) Bidding Credits. Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses:

(i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; and

(ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and

(iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In § 24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

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(f) Unjust Enrichment. Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the unjust enrichment provisions contained in § 1.2111 of this chapter.

5. Section 24.704(a)(2) is revised to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

(a) ***

(2) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

*****

7. Section 24.711 is amended by revising paragraph (b) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Blocks C.

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(b) Installment Payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(g) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years (calculated in accordance with § 24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with gross revenues not exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a Small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first

two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment. See § 1.2111 of this chapter.

8. Section 24.712 is amended by revising paragraph (d) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Blocks C.

*****

(d) Unjust Enrichment. See § 1.2111 of this chapter.

9. Section 24.716 is amended by revising paragraph (c) and (d) to read as follows:

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

*****

(c) Late Installment Payments. See § 1.2110(f)(4) of this chapter.

(d) Unjust Enrichment. See § 1.2111 of this chapter.

10. Section 24.717 is amended by revising paragraph (c) to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

*****

(c) Unjust Enrichment. See § 1.2111 of this chapter.

PART 27 - WIRELESS COMMUNICATIONS SERVICE

1. The authority citation for Part 27 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

2. Section 27.203 is amended by revising paragraph (b) to read as follows:

§ 27.203 Withdrawal, default and disqualification payments.

*****

(b) Default or disqualification after close of auction. See § 1.2104(g)(2) of this chapter.

2. Section 27.209 is amended by revising paragraph (d) to read as follows:

§ 27.209 Designated entities; bidding credits; unjust enrichment.

*****

(d) Unjust Enrichment. See § 1.2111 of this chapter.

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 251-2, 303 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303 309 and 332, unless otherwise noted.

2. Section 90.805(c) is revised to read as follows:

§ 90.805 Withdrawal, default and disqualification payments.

*****

(c) Default or disqualification after close of auction. See § 1.2104 (g)(2) of this chapter.

*****

3. Section 90.812 (a) and (b) are revised to read as follows:

§ 90.812 Installment payments for licensees won by small businesses.

(a) Installment Payments. See § 1.2110(f)(4) of this chapter.

(b) Unjust Enrichment. See § 1.2111(c) of this chapter.

PART 95 - PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.816(c)(6) and (e) are amended to read as follows:

§ 95.816 Competitive bidding proceedings.

*****

(c) ***

(6) Default or disqualification. See § 1.2104 (g)(2) of this Chapter.

*****

(e) Unjust Enrichment. See § 1.2111 of this Chapter.

*****

APPENDIX E

Proposed Rules

Part 1 of Title 47 of the Code of Federal Regulations is proposed to read as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 207, 303 and 309(j), unless otherwise noted.

2. Section 1.2110 is revised to read as follows:

§ 1.2110 Designated entities.

(a) ***

*****

(b) Eligibility for small business provisions.

(1) Size Attribution. The gross revenues of the applicant (or licensee), its controlling interests and their affiliates shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. Applicants seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and their affiliates.

(2) Aggregation of Affiliate Interests. Persons or entities that hold interest in an applicant (or licensee) that are affiliates of each other or have an identify of interests identified in § 1.2110(d) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1. ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2. ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions.

(i) Small business consortia. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues and total assets of each small business consortium member shall not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) Definitions.

(1) Small businesses. The Commission will establish the

definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interest.

(i) For purposes of this section, controlling interest includes individuals or entities with both de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of Certain Interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to

any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth in paragraph (d)(2)(ii)(B) of this section.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person orits affiliate pursuant to paragraph (c)(5) of this subsection, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

(i) The nature or types of services offered by such an

applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non- controlling principals will not deprive the

minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

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Amendment of Part 1 of the Commission's Rules – Competitive Bidding
Proceeding, Third Report and Order and Second Further Notice of Proposed Rule Making

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH

By today's action, the Commission has consolidated and streamlined its spectrum auction rules. At the same time, and in order to provide existing licensees and future bidders additional regulatory certainty and fairness, the Commission has endeavored to harmonize its auction rules among the various spectrum-based services to which these rules apply. I believe the benefits of these changes will outweigh their costs. Accordingly, I support the item.

We did not, however, undertake the more difficult task of revamping our entire auction system. In my view, this proceeding (the latest round of which began nearly a year ago) should have elicited more thorough public comment on how the system could be improved.

For example, with a more complete record, we could have used this opportunity to permanently discard rules – such as our ill-fated installment payment system – that thrust the

Commission into the role of unwitting (and unqualified) banker to our licensees. I find it incredibly inefficient and unsound policy for a federal government agency, especially one with no banking expertise, to substitute itself and its judgments for those of private financial institutions and markets.

In the end, however, we have respected the requirements of the law and, where appropriate, we have recognized the critically important role of all designated entities under Section 309(j) of the Act, including small businesses and rural telephone companies, in our economy and society. I believe that, within the bounds of the law, we must be faithful to companies such as these, just as companies in competitive markets must be faithful to their customers. As regulators, the FCC's fidelity can be measured in part by how little burden we force industry and consumers to shoulder. By adding certainty and fairness to our auction rules, today we have lifted some part of the burden of regulation.

Statement of Commissioner Gloria Tristani on the Adoption the Third Report and Order and Second Further Proposed Rulemaking on the Amendment of the Commission's Part 1 Auction Rules

December 18, 1997

It is fitting that we streamline, simplify and standardize our auction rules. These rules reduce the burden for applicants and licensees by adopting, where appropriate, uniform rules that will apply regardless of the service to be provided. But we also retain the flexibility to tailor some provisions to individual services. The guidance these rules provide will serve the public and the Commission alike by easing, and speeding, the auctions rulemaking process.

I wish to note a vital issue that remains. Today we affirm our commitment to eliminate barriers to entry and to ensure that minorities and women have the opportunity to participate in the provision of spectrum-based services. Under Section 257, we have already initiated several studies in the broadcast area, and we will soon initiate a study concerning participation and barriers to entry in the auctions context.

To date, minority and women-owned businesses have benefitted from the small business provisions we have offered – installment payments, bidding credits and entrepreneurs blocks. Thus, of the more than four thousand licenses awarded by auction, approximately 11 percent have been awarded to minority- owned businesses and 11 percent to women -owned businesses. However, in light of our decision today to suspend use of installment payments for the foreseeable future, we must pay attention to the unique obstacles facing minorities and women as they seek to participate in the telecommunications revolution. In the further notice, we seek comment on these obstacles and on what remedies we might offer to facilitate widespread participation. I will be especially interested in the comments and proposals we receive to fulfill our statutory obligations.

Federal Communications Commission (F.C.C.)

NOTE: An Erratum is attached to the end of this document.

Order on Reconsideration of the Third Report and Order,
Fifth Report and Order,
and Fourth Further Notice of Proposed Rule Making

IN THE MATTER OF AMENDMENT OF PART 1 OF THE
COMMISSION'S RULES -
COMPETITIVE BIDDING PROCEDURES
WT Docket No. 97-82

FCC 00-274
Adopted: July 27, 2000
Released: August 14, 2000

Comment Date: 45 days after publication in the Federal Register

Reply Comment Date: 66 days after publication in the Federal Register

By the Commission:

I. OVERVIEW

1. This Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making ("Order on Reconsideration," "Fifth Report and Order" and "Fourth Notice") clarifies and amends our general competitive bidding rules for all auctionable services. [FN1] These modifications are intended to increase the efficiency of the competitive bidding process and provide more specific guidance to auction participants. In the past, the Commission adopted separate competitive bidding rules for each auctionable service. [FN2] This rule making is part of

our ongoing effort to establish a uniform and streamlined set of general competitive bidding rules for all auctionable services and to reduce the burden on both the Commission and the public of conducting service-specific auction rule makings.

2. In 1994, in implementing the Omnibus Budget Reconciliation Act of 1993, the Commission prescribed certain general competitive bidding rules and procedures, indicating that it would use these general rules and procedures as a basis for adopting specific competitive bidding rules for each auctionable service. [FN3] In 1997, after completing 15 spectrum auctions and adopting service-specific bidding rules for each such auction, we initiated a proceeding to expand the general competitive bidding rules, contained in Part 1, Subpart Q of our rules, and replace any inconsistent or repetitive service-specific auction rules. [FN4] The most recent comprehensive order in this proceeding was the Third Report and Order and Second Further Notice of Proposed Rule Making ("Part 1 Third Report and Order" and "Second Notice"). [FN5] In this Order on Reconsideration, we address petitions for reconsideration and comments filed in response to the Part 1 Third Report and Order. The Fifth Report and Order addresses comments filed in response to the Second Notice, and the Fourth Notice adopted herein seeks comment on additional proposals relating to the general competitive bidding rules.

II. EXECUTIVE SUMMARY

3. In this Order on Reconsideration we:

. Amend Section 1.2105(c)(1) of our rules to clarify that the prohibition on collusion begins on the filing deadline for short-form applications and ends on the down payment deadline.

. Clarify and correct the ownership disclosure requirements contained in Section 1.2112 of our rules. In particular, with

respect to entities not seeking designated entity status, we eliminate the requirement to include debt and instruments such as warrants, convertible debentures, options and other debt interests in reporting their ownership interests.

. Amend Section 1.2104(g)(1) of our rules to clarify that in the case of multiple bid withdrawals on a single license, within the same or subsequent auction(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. We further clarify that no withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auction(s), equals or exceeds that withdrawn bid. In addition, we amend Section 1.2104(g)(1) of our rules to provide that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the bid withdrawals.

. Retain, for the most part, the installment payment grace period and late payment fee provisions adopted in the Part 1 Third Report and Order, but adopt a slight modification to the payment due dates for late installment payments and associated late fees.

. Clarify that licensees continue to have the opportunity to seek restructuring of installment payments. There is, however, no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring. Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) as adopted herein.

. Clarify that the assignee or transferee of a license paid for through installment payments is not responsible for the license debt until the assignment of license or transfer of control has been consummated.

. Clarify that the unjust enrichment rules for bidding credits

(Section 1.2111(d) of the Commission's rules) do not apply to assignments or transfers of C and F block licenses to non-entrepreneurs. We further clarify that pursuant to Sections 1.2111(c) and (d) of our rules, Commission approval of assignments of licenses and transfers of control that result in unjust enrichment with respect to bidding credits and installment payments is conditioned upon full payment of the required unjust enrichment payments on or before the consummation date.

. Clarify that licensees defaulting on installment payments are subject to the default provisions of Section 1.2110(f)(4) of our rules (redesignated herein as Section 1.2110(g)(4)), and not to Section 1.2104(g).

. Incorporate into the Part 1 general competitive bidding rules the "former defaulter" policies adopted with respect to C block auction applicants. Specifically, we: (1) allow "former defaulters," i.e., applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-tax debts and all associated charges or penalties, to certify on FCC Form 175 that they are not in default and are, therefore, eligible for auction participation; and (2) require "former defaulters" to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction.

. Clarify that licensees defaulting on installment payments will be permitted to participate in future Commission spectrum auctions if they have either (1) paid all of their outstanding non-tax debt, along with all associated charges and penalties; or (2) been relieved of such obligations pursuant to otherwise applicable law. In all instances, installment payment defaulters eligible to participate in future auctions will be required to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction to assure their future financial soundness.

4. In this Fifth Report and Order we:

. Decline, at this time, to adopt special provisions for minority- and women- owned businesses pending completion of a series of market studies to determine whether, and under what circumstances, targeted preferences for minorities and women are appropriate. We note, however, that minority- and women-owned businesses that qualify as small businesses may take advantage of the provisions we have adopted for small businesses.

. Decline, at this time, to adopt special provisions for rural telephone companies, such as bidding preferences or an unserved area fill-in policy. We note, however, that we will continue to provide rural telephone companies with bidding credits should such entities qualify as small businesses.

. Adhere to our previous decision to suspend the installment payment program. We will, however, continue to provide small businesses with bidding credits as we have done in auctions for a number of services, e.g., the Local Multipoint Distribution Service ("LMDS"), Location and Monitoring Service ("LMS"), 220 MHz and VHF Public Coast services.

. Adopt as our general attribution rule a controlling interest standard for determining which applicants qualify as small businesses. Under this standard, we will attribute to the applicant the gross revenues of its controlling interests and their affiliates in assessing whether the applicant qualifies for our small business provisions, such as bidding credits. We do not adopt a minimum equity threshold. Rather, applicants will be required to identify controlling interests based on the principles of either de jure or de facto control. Current C and F block licensees will continue to be eligible to hold their licenses regardless of whether or not they would qualify under the newly established attribution rules adopted herein. As to future C and F block auctions, however, all applicants, including existing C and F block licensees, will be subject to the attribution rules in effect at the time of filing their short-form applications.

. Maintain our rule of calculating default payment amounts on a license-by- license basis and implement the Balanced Budget Act provisions regarding administrative filing periods as set forth below.

. Delegate to the Wireless Telecommunications Bureau the authority to make any revisions to the Code of Federal Regulations that are necessary to conform the service-specific auction rules to the Part 1 general competitive bidding rules.

5. In this Fourth Notice we:

. Seek comment on whether to use a total assets test in conjunction with the gross revenues measure already employed to determine business size.

. Seek comment on proposed exceptions to the requirement in the Part 1 attribution rules that certain stock interests be calculated on a "fully diluted" basis.

III. ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER

A. Introduction

6. In response to the Part 1 Third Report and Order, we received seven petitions for reconsideration and two comments in support of the petitions for reconsideration. [FN6] The petitioners raise various issues regarding installment payments for auction-won licenses. [FN7] For the reasons discussed below, we clarify certain rules at petitioners' request and dismiss or deny these petitions in all other respects. Further, we address comments filed in response to the ULS Notice that relate to aspects of our auction rules. [FN8] In addition, we take this opportunity to clarify, on our own motion, certain aspects of the Part 1 Third

Report and Order.

B. Clarification of Prohibition on Collusion

7. Background. Section 1.2105(c)(1) of the Commission's rules generally prohibits collusion between competing bidders from "after the filing of short- form applications ... until after the high bidder makes the required down payment ...." [FN9] Our bidder information packages generally state that """[t]his prohibition begins with the filing of short-form applications, and ends on the down payment due date." [FN10] Our Public Notices specifically provide that the collusion prohibition becomes effective on the "filing deadline of short-form applications" and ends on the "post-auction down payment due date." [FN11] To avoid any confusion regarding when the prohibition on collusion begins and ends, we believe it is necessary to amend Section 1.2105(c)(1) of our rules. [FN12]

8. Discussion. On our own motion, we amend Section 1.2105(c)(1) of our rules to provide that applicants are prohibited from communicating with each other about bids, bidding strategies, or settlements from "after the short-form application filing deadline . . . until after the down payment deadline ...." This rule change makes clear that competing bidders may not engage in communications prohibited by the rule from the date that short-form applications are due to the Commission until after the down payment deadline has passed. The amendment affirms that there is a uniform date for all bidders on which restrictions on communications begin and end. Our clarification conforms Section 1.2105(c)(1) to our practice of applying the collusion prohibition to applicants beginning on the due date for the submission of short-form applications. [FN13] In addition, it is consistent with our policy of not permitting individual bidders to abbreviate the period during which the collusion prohibition is in effect by submitting down payments prior to the down payment due date.

C. Clarification of Section 1.2112

9. Background. In the Part 1 Third Report and Order, we concluded that detailed ownership information is necessary to ensure that applicants claiming designated entity status qualify for such status and that all applicants comply with spectrum caps and other ownership limits. [FN14] We also stated that disclosure of ownership information helps bidders identify entities that are subject to our anti-collusion rules. [FN15] To these ends, we promulgated Section 1.2112, [FN16] based on our broadband PCS rules, [FN17] to serve as a uniform ownership disclosure rule for all auctionable services. [FN18]

10. Discussion. Because a number of applicants in the Phase II 220 MHz auction found Section 1.2112 confusing, we have decided, on reconsideration, to reorganize the rule in a more logical, straightforward manner. We first revise Section 1.2112(b)(1) to use the term "controlling interest" to describe the parties whose connection or relationship with another FCC-regulated business must be reported under (b)(1). [FN19] Then, because identification of controlling interests is significant only for applicants claiming designated entity status, we include those reporting requirements related to such status in paragraph (b), which applies only to applicants claiming eligibility for small business provisions. [FN20] We also correct the rule to indicate that gross revenues must be reported not only on the long-form application, but also on the short-form application. [FN21]

11. In addition, we correct Section 1.2112(a)(3) in which we used language that was overly broad. Section 1.2112(a)(3) states erroneously that an applicant must provide: "[a] list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant." [FN22] This language has the unintended effect of requiring the reporting of parties with a distant relationship to the

applicant. Section 1.2112(a)(3), however, also provides the following example: "If Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application." [FN23] The rule's example accurately reflects which parties we intended the applicant to report. That is, when a company (Company A) that must be reported under the rule because of its ownership interest in the applicant (Company B) also owns at least 10 percent of another company that is an FCC-licensed entity or applicant for an FCC license (Company C), Company C must be reported. Our intent was to require that FCC-regulated entities be reported when there is a connection between such an entity and the applicant at issue through a common owner. We therefore amend Section 1.2112 to better reflect our intent and comport with the example provided in the rule. [FN24] In addition, we amend Section 1.2112 to require applicants to disclose, in the case of a limited liability company, only those members that hold a 10 percent or greater interest in the applicant. [FN25] Section 1.2112(a)(8), as adopted in the Part 1 Third Report and Order, required applicants to disclose all members of a limited liability company, regardless of their ownership interest in the applicant. We now revise the disclosure requirement pertaining to limited liability companies to be consistent with those regarding limited partnerships. Finally, we change other aspects of the sequencing so that the revised rule begins by seeking general information in Sections 1.2112(a)(1) through (a)(4) and becomes progressively more detailed in (a)(5) and (a)(6). [FN26] This "building block" approach is intended to provide applicants with a clearer understanding regarding the information that must be disclosed.

12. We also take this opportunity to address relevant comments that were filed separately in response to the ULS Notice. [FN27] In their comments on the ULS Notice, AT&T, BAM, and FCBA object to the breadth of information collected in Section 1.2112. [FN28] In particular, they argue that the requirement to identify direct and indirect owners with an interest of 10 percent or greater is burdensome and

overly broad. [FN29] We disagree. We believe that the 10 percent reporting requirement helps competing bidders accurately assess the legitimacy of their auction opponents and their respective bids. [FN30] As discussed in the Part 1 Third Report and Order, the collection of detailed ownership information is necessary for ensuring compliance with ownership limits, such as spectrum caps. [FN31] Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. [FN32] We agree with commenters, however, that Section 1.2112 could be less burdensome in certain regards. Therefore, except for entities claiming special eligibility or designated entity status, we will not require applicants to include information regarding warrants, convertible debentures, stock options, debt securities or other debt interests as part of the 10 percent reporting requirement unless and until conversion of such interests is effected. Generally, the Commission has not included such interests in calculating ownership interests under rules establishing various ownership limits. [FN33] We agree with FCBA and AT&T that the current reporting burden imposed on applicants may exceed the benefit of requiring disclosure of these interests. [FN34] We continue to believe, however, that in calculating ownership interests for the purpose of determining designated entity status and eligibility for bidding credits, warrants, convertible debentures, options and other debt interests must be treated as having been exercised and must be reported as part of the applicant's disclosure. [FN35] In the case of applicants seeking special eligibility or designated entity status, the Commission has traditionally treated these interests as being fully diluted because it is reaching determinations regarding the bona fide nature of the applicant. [FN36] Thus, we agree with AT&T that it is reasonable for the Commission to require more ownership information from these entities where such information is designed to show that the special eligibility and/or bidding credit is both legitimate and warranted. [FN37]

D. Computation of Bid Withdrawal Payments Under Section 1.2104

13. Background. Section 1.2104(g)(1) of the Commission's rules sets forth the payment obligations of a bidder that withdraws a high bid on a license during the course of an auction. [FN38] Specifically, it provides that a bidder that withdraws a standing high bid is subject to a payment equal to the difference between the amount of the withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. [FN39] As the auctions program has evolved, however, the Commission has encountered situations involving multiple bid withdrawals on a single license, which are not specifically addressed by Section 1.2104(g)(1) of the Commission's rules. We, therefore, believe it is necessary to broaden our rule to clarify its application to this particular contingency. In addition, we wish to modify Section 1.2104(g)(1) to more specifically articulate our policy of assessing interim bid withdrawal payments.

14. Discussion. On our own motion, we clarify a policy that the Bureau has relied on in the past. If a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the net high bid in the same or subsequent auction(s). In the case of multiple bid withdrawals on a single license, within the same or subsequent auction(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. [FN40] No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auction(s), equals or exceeds that withdrawn bid. Thus, a bidder that withdraws a bid will not be responsible for any withdrawal payments if there is a subsequent higher bid in the same or subsequent auction(s). This policy allows bidders to most efficiently allocate their resources as well as to evaluate their bidding

strategies and business plans during an auction while, at the same time, maintaining the integrity of the auction process. The Bureau retains the discretion to scrutinize multiple bid withdrawals on a single license for evidence of anti-competitive strategic behavior and take appropriate action when deemed necessary.

15. We also wish to modify Section 1.2104(g)(1) of our rules to state more specifically our policy of assessing interim bid withdrawal payments. We amend Section 1.2104(g)(1) to provide that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the bid withdrawals. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed at the close of the subsequentauction of the license. Assessing an interim bid withdrawal payment ensures that the Commission receives a minimal withdrawal payment pending assessment of any final withdrawal payment. Below are some examples showing application of the bid withdrawal payment rule:

(1) Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $90 and withdraws. In that same auction, Bidder C wins the license at a bid of $95. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100 - $95). Bidder B owes nothing.

(2) Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $95 and withdraws. In that same auction, Bidder C wins the license at a bid of $90. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100 - $95). Bidder B owes $5 ($95 - $90).

(3) Bidder A withdraws a bid of $100. Subsequently, in that same auction, Bidder B places a bid of $90 and withdraws. In a subsequent auction, Bidder C places a bid of $95 and withdraws. Bidder D wins the license in that auction at a bid of $80. Withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of $100, or

$3, and Bidder B would owe 3% of $90, or $2.70). At the end of the second auction, Bidder A would owe $5 ($100 - $95) less the $3 interim withdrawal payment for a total of $2. Because Bidder C placed a subsequent bid that was higher than Bidder B's $90 bid, Bidder B would owe nothing. Bidder C would owe $15 ($95 - $80).

E. Installment Payment Grace Periods and Imposition of Late Payment Fees

16. Background. The installment payment rules, adopted in the Competitive Bidding Second Report and Order, permitted a licensee to make an installment payment up to 90 days after the due date without a late payment charge and without being considered in default. [FN41] A licensee whose installment payment was more than 90 days past due, however, was in default, unless a "grace period" request was filed prior to the payment due date. [FN42] Specifically, in anticipation of default on one or more installment payments, a licensee could request that the Commission grant a three to six month grace period during which no installment payments need be made. [FN43] The licensee would not be declared in default during the pendency of such request. Grant of the request would result in the licensee not being considered in default during the grace period, and the interest that accrued while no payments were made would be amortized over the remaining term of the license. [FN44] Following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or default with no such request submitted, the license would cancel automatically. [FN45]

17. In the Part 1 Third Report and Order, we modified the grace period provisions as applied to all licensees participating in an installment payment plan at that time. [FN46] These provisions took effect on March 16, 1998, 60 days after their publication in the Federal Register. [FN47] Thus, beginning with installment payments due on or after

March 16, 1998, a licensee that did not make an installment payment when due automatically had an additional 90 days in which to submit its required payment without being considered delinquent, but was assessed a late payment fee equal to 5 percent of the amount of the past due installment payment. [FN48] If the licensee failed to make the required payment within the first 90-day period, the licensee was automatically provided a subsequent 90 days to submit its required payment without being considered delinquent, this time subject to a second, additional late payment fee equal to 10 percent of the amount of the past due installment payment. [FN49] The licensee was not required to submit a request to take advantage of these provisions. A licensee that failed to make payment within 180 days after an installment payment due date sufficient to pay all past due late payment fees, interest, and principal, was deemed to have failed to make full payment of its obligation and the license was automatically cancelled without further Commission action. [FN50] The late payment fee and automatic cancellation provisions described above did not apply to licensees with grace period requests that were properly filed prior to the effective date of the Part 1 Third Report and Order until such time as the Commission (or the Bureau upon delegated authority) addressed these grace period requests. [FN51]

18. Discussion. All petitioners oppose some aspect of the modified provisions relating to the submission of late installment payments. Specifically, Alpine PCS and CONXUS seek repeal of the rules requiring late payment fees; [FN52] DiGiPH and Houston 936 object to the imposition of late payment fees and request that the Commission retain the 90-day non-delinquency period with no late fee imposed; [FN53] NextWave proffers a 270-day late payment window consisting of a 90-day non-delinquency period, followed by two automatic 90-day periods in which a monthly late payment fee would apply; [FN54] and CTI and Loli request that the Commission allow licensees in the 218-219 MHz Service (formerly, Interactive Video and Data Service) to continue submitting grace period requests. [FN55] In challenging the modified late payment provisions, petitioners generally argue

that: (1) they are unfair, punitive, and commercially unreasonable; (2) they constitute impermissible retroactive rulemaking as applied to licensees currently participating in the installment payment plan; and (3) they violate basic contract principles. We address each of these arguments in turn.

19. While installment payments must be timely, the Commission's grace period provisions provide limited relief for entities that find themselves in financial distress. [FN56] Petitioners claim that the revised late payment provisions are unfair because, in determining auction and construction strategies, petitioners had relied on the availability of a 90-day non- delinquency period and deferral of payment obligations while grace period requests remained pending. [FN57] The Commission's late payment provisions, however, were not intended to serve as a tool that licensees might use in their normal course of planning auction strategy and build-out. These provisions are provided for extraordinary circumstances – instances of financial distress – for which temporary relief is appropriate. Petitioners' assertions of reliance on such provisions for any other purpose are misplaced. Petitioners also claim that it is punitive and commercially unreasonable to impose the same late payment fee amount whether the payment arrives one day late or ninety days late. [FN58] We disagree. Our fundamental goal in adopting the late payment provisions is to encourage payment by the due date. Achievement of this goal is best attainable by adhering to the 5 percent and 10 percent late payment fee schedule we have adopted. A prorated approach towards late fees could serve as a disincentive to licensees to pay on time and, thereby, undermine achievement of our basic goal. As we stated in the Part 1 Third Report and Order, our """approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues before payment due dates." [FN59] Further, the approach we have taken is a commercially reasonable debt management practice used with respect to a variety of debt instruments from credit cards to mortgages. Therefore, we disagree with

petitioners' claims that the revised late payment provisions are unfair, punitive, and commercially unreasonable.

20. Petitioners also contend that the regulatory changes to the installment payment program adopted in the Part 1 Third Report and Order are unlawfully retroactive, insofar as they could have an adverse effect on the previously established installment payment obligations. [FN60] For example, CTI claims that the revised late payment rules unsettle the expectations of licensees that opted to pay for licenses in installments. [FN61] CONXUS argues that a "rule" under the Administrative Procedure Act ("APA") is supposed to embody "the whole or a part of any agency statement of general or particular applicability and future effect ...." [FN62] These arguments do not withstand analysis.

21. Our new Part 1 rules do not violate the prohibitions on "primary retroactivity" under the APA as set forth in Supreme Court cases such as Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988). We have not, for example, gone back to past transactions and imposed new penalties for conduct which was previously allowed by our rules. Rather, the Commission here merely prescribed rules for the future, i.e., prospective procedures by which licensees remit installment payments after March 16, 1998, the effective date of the new rules, that deal with past transactions, i.e., the previously established installment payment obligations. Such a rule change does not constitute unlawful retroactive rulemaking under the APA. [FN63]

22. Further, the fact that the new rules may unsettle expectations about the economic benefits of participating in the installment payment plan does not make the new rules unlawfully retroactive. In that regard, the U.S. Court of Appeals for the D.C. Circuit has explained: "[A] new rule or law is not retroactive 'merely because it ... upsets expectations based on prior law." DD" [FN64] This type of "secondary" retroactivity is an entirely lawful consequence of much agency rulemaking and does not by itself render a rule invalid. [FN65] Commission licensees, in particular, have no

vested right to an unchanged regulatory scheme throughout their license term. [FN66] Therefore, petitioners' claim that the revised late payment provisions are unlawfully retroactive fails.

23. Finally, petitioners contend that contract law precludes application of the new late payment procedures to licensees paying for their licenses in installments prior to the effective date of the Part 1 Third Report and Order. Houston 936, for example, challenges the Commission's elimination of the 90-day non-delinquency period, which was incorporated as a term of the existing promissory notes executed by 900 MHz Specialized Mobile Radio service (900 MHz SMR) licensees. [FN67] CONXUS and CTI argue that adoption of the new late payment procedures constitutes unilateral modification (i.e., breach) of a contract between the Commission and the licensees for payment of licenses under specified payment terms even without a signed promissory note. [FN68]

24. Installment payment programs currently exist in the following services: the 218-219 MHz Service, [FN69] broadband Personal Communications Services (PCS) frequency block C, [FN70] broadband PCS frequency block F, [FN71] broadband PCS frequency block A (pioneers' preference licensees only), [FN72] regional narrowband PCS, [FN73] 900 MHz SMR, [FN74] and the Multipoint Distribution Service (MDS). [FN75] For some services in which we have offered installment payments, far from being punitive and unreasonable, we have afforded extraordinary relief regarding installment payment obligations. Specifically, we suspended the effect of the new late payment provisions as applied to any license in the 218-219 MHz Service for which a properly filed grace period request was pending or for which adequate installment payments were made as of March 16, 1998, pending Commission resolution of issues raised in the 218-219 MHz Service Order and NPRM. [FN76] Most recently, we offered restructuring to certain 218-219 MHz Service licensees. [FN77] Further, licensees in the broadband PCS frequency blocks C and F that are participating in the installment payment program have signed note modifications

that incorporate the late payment provisions described in 47 C.F.R. § 1.2110(f)(4) (redesignated herein as 47 C.F.R. § 1.2110(g)(4)). [FN78] Regarding these licensees, therefore, there is no conflict between the application of the new late payment procedures and contract law.

25. Among the remaining licensees that have benefitted from Commission installment payment plans, licensees in broadband PCS frequency block A and regional narrowband PCS did not sign separate loan documents. The payment terms and conditions with respect to these licenses, therefore, have always been a matter of Commission regulation through the Part 1 rules. In this regard, the following language appears on the licenses themselves: "This authorization is subject to the condition that the remaining balance of the winning bid amount will be paid in accordance with Part 1 of the Commission's rules, 47 C.F.R. Part 1." These licensees were aware, or should have been aware, that the terms and conditions of Part 1 or other aspects of the license can be modified by the Commission by rulemaking, and that such changes have been uniformly upheld by the courts as lawful. [FN79] The Part I rules at issue in this proceeding were modified subject to APA-consistent administrative rulemaking procedures and are intended to provide greater flexibility to licensees in determining their use of grace periods and late payment provisions. The application of our modified late payment provisions does not constitute a breach of contract as argued by these petitioners.

26. Some SMR and MDS licensees argue that the Promissory Note and Security Agreements executed by these licensees bound the Commission to the rules in place at the time of the license grant. This is demonstrably incorrect. The Commission did not promise these licensees, or any other licensees, that the Part 1 rules would remain unchanged during the license term. Rather, the Note and Security Agreement provide that the licensee must comply with "all Commission orders and regulations applicable to the licensee," [FN80] without regard to the time in which those applicable rules were promulgated or amended. [FN81] The

SMR and MDS notes emphasized that the Commission's rules, as amended, would take precedence over the terms of the notes in case of any conflict. [FN82] Moreover, when addressing future events, such as the making of installment payments, applications for grace periods and incidents of default, the Note and Security Agreement refer to the "then-applicable" rules of the Commission, [FN83] a clear reference to the rules that would be applicable at the time of such events. Specifically with respect to "grace periods" which were modified by the revision of Part 1, the SMR and MDS Notes are worded conditionally – "if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission." [FN84] This conditional language confirms that the "then-applicable" grace period rules referred to in the Note are those rules that may exist at the time in the future when a grace period is sought, and not necessarily the rules that were in place at the time of the license grant; otherwise, the sentence would not have been phrased as a contingency, but would have cited whatever grace period rules were in effect at the time of the Note. Given these provisions, the last paragraph in the Note – which states that the Note may not be changed except by an agreement in writing executed by the party against whom enforcement of such change is sought [FN85] – means that individual modifications to any particular agreement must be made in writing by mutual consent. Significantly, however, this clause does not preclude service-wide changes of the governing rules by the agency's public notice and comment rulemaking process. Specifically, the Payee, by signing such Note, has already agreed to be bound by the Commission's rules as they may be amended from time to time in the provisions of the Note and Security Agreement referencing the "then-applicable" rules of Commission. [FN86] We, therefore, retain the modified grace period and late payment fee provisions adopted in the Part 1 Third Report and Order. [FN87]

27. As discussed above, we conclude that the revised late payment rules are not commercially unreasonable, do not constitute impermissible retroactive rulemaking, and do not

violate basic contract principles. We believe, however, that a slight modification to the payment due dates for late installment payments and associated late fees would benefit licensees. Under the Part 1 Third Report and Order, licensees that miss an installment payment are given up to two 90-day periods in which to submit the installment payment and associated late fee without being considered delinquent. [FN88] Regularly scheduled installment payments, on the other hand, are due quarterly (i.e., every 3 months), which may provide a licensee with up to 92 calendar days to make timely payment depending upon the month in which the payment is due. This discrepancy in payment due dates may cause confusion for licensees. For example, a late installment payment and associated late fee may be due a day or two before the next regularly scheduled quarterly installment payment. Because these due dates are so proximate, licensees may mistakenly assume that they can pay their late installment payment and late fee on the due date of the next regularly scheduled quarterly installment payment without incurring an additional late payment fee or being considered delinquent.

28. In order to avoid any confusion as to when late installment payments and accompanying late fees are due, we will amend the due dates for late installment payments to comport with quarterly due dates. Specifically, rather than providing licensees that fail to make timely installment payments with two 90-day periods in which to satisfy their payment obligations, we will provide such licensees with two quarters (two 3-month periods) in which to submit their late installment payments and required late fees without being considered delinquent. Thus, due dates for late installment payments and associated late fees will coincide with quarterly due dates for regularly scheduled installment payments. Although we modify the due dates for submitting late installment payments, we do not change the associated late fee provisions. We, therefore, amend Section 1.2110(f)(4) (redesignated herein as Section 1.2110(g)(4)) of our rules to provide that a licensee that fails to make an installment payment when due will be permitted to make its required

payment by the end of the next quarter (a 3-month period) without being considered delinquent, but will be assessed a late payment fee equal to 5 percent of the amount of the past due installment payment. [FN89] If the licensee fails to make the required payment within the first quarter after the regularly scheduled due date, the licensee will be allowed to make its required payment by the end of the subsequent quarter without being considered delinquent, this time subject to a second, additional late payment fee equal to 10 percent of the amount of the past due installment payment. [FN90] The licensee is not required to submit a request to take advantage of these provisions. A licensee that fails to make payment within two quarters (or 6 months) after an installment payment due date sufficient to pay all past due late payment fees, interest, and principal, will be deemed to have failed to make full payment of its obligation and, as has been the case since the inception of our competitive bidding and auction specific installment payment rules, the license will automatically cancel without further Commission action. [FN91]

F. Installment Payment Restructuring

29. Background. In the Competitive Bidding Second Report and Order, the Commission stated that once it granted a grace period request, "a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan." [FN92] Reference to a restructured payment plan also appeared in the former grace period rule, Section 1.2110(e)(4)(ii), which permitted licensees to temporarily suspend their installment payments pending the restructuring of such payment obligations. [FN93] In amending Section 1.2110 to be consistent with our decision in the Part 1 Third Report and Order to revise the late payment provisions and eliminate the grace payment procedure, we removed language that referred to a restructured payment schedule.

30. Discussion. NextWave objects to the elimination of language in Section 1.2110 referring to a restructuring of installment payments. [FN94] NextWave contends that the Commission eliminated the option to restructure without providing notice and comment or any rationale for the elimination in violation of the APA. [FN95] By removing language in Section 1.2110(e)(4)(ii) that referenced a restructured payment schedule, we did not intend to eliminate a licensee's option to request restructuring of its installment payment obligations. We simply sought to amend the rule to provide for automatic grace periods rather than requiring a showing of financial need to support a grace period request. Licensees in the installment payment program may still submit requests for payment restructuring or workouts. There is, however, no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring. Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) as adopted herein. [FN96] Because licensees continue to have the opportunity to seek restructuring of installment payments, the Commission was not required under the APA to seek comment on the elimination of that option. Moreover, the reference to a """restructured payment schedule" in Section 1.2110(e)(4)(ii) was part and parcel of our rule section that provided for individual grace period requests and financial distress showings. [FN97] We proposed to amend that rule section in its entirety and adopt automatic grace periods in the Part 1 Notice of Proposed Rule Making. [FN98] Interested parties could reasonably have anticipated that our proposal to amend the grace period request rule could result in the amendment of language in that rule referencing restructuring. Thus, omitting a reference to a restructured payment schedule is within the specific scope of the Part 1 Notice of Proposed Rule Making [FN99] to adopt automatic grace periods and eliminate the requirement to file financial distress showings and, therefore, is not violative of the APA.

[***]

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Analyses

89. Pursuant to the Regulatory Flexibility Act, [FN258] a Supplemental Final Regulatory Flexibility Analysis for the Order on Reconsideration is attached at Appendix C.

90. A Final Regulatory Flexibility Analysis for the Fifth Report and Order is contained in Appendix D.

91. An Initial Regulatory Flexibility Analysis ("IRFA") for the Fourth Notice is attached at Appendix E. [FN259] Comments on the IRFA should be labelled as IRFA Comments, and should be submitted pursuant to the filing dates and procedures set forth in paragraphs 94-97, infra.

B. Paperwork Reduction Act Analysis

92. This Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days after publication of the Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the

functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

93. In addition to filing comments on the information collections contained in this Fifth Report and Order with the Secretary, a copy of any comments on the information collections should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov."

C. Filing Procedures

94. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. § § 1.415, 1.419, interested parties may file comments on or before 45 days after publication in the Federal Register, and reply comments on or before 66 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 13 FCC Rcd 11322, 11326 (1998).

95. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced

in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

96. Parties that choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, The Portals, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. In addition, a courtesy copy should be delivered to Leora Hochstein, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room #4A633, Washington, D.C. 20554.

97. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Comments and reply comments will be available for public inspection and duplication during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554. Copies also may be obtained from International Transcription Services, Inc., 445 12th Street, S.W., Room CY-B400, Washington, DC 20554, (202) 314-3070.

D. Contacts for Further Information

98. For further information concerning this Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule

Making, contact Leora Hochstein at (202) 418-1022 (Auctions and Industry Analysis Division, Wireless Telecommunications Bureau). For additional information concerning the information collections contained in this Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, contact Judy Boley at (202) 418- 0214 or via the Internet at jboley@fcc.gov.

E. Ordering Clauses

99. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § § 154(i), 303(r) and 309(j), the petitions for reconsideration and informal requests for clarification filed in response to the Part 1 Third Report and Order are GRANTED IN PART and DENIED IN PART, as provided herein.

100. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § § 154(i), 155(b) 155(c)(1), 303(r), and 309(j), this Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making is hereby ADOPTED and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix A, effective 60 days after publication in the Federal Register. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

101. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § § 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted

herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

102. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, including the Supplemental Final Regulatory Flexibility Analysis, the Final Regulatory Flexibility Analysis, and the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

FN1. The general competitive bidding rules are codified at 47 C.F.R. § § 1.2101-1.2113.

FN2. See, e.g., 47 C.F.R § § 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R § § 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. § § 24.701-24.720 (broadband PCS); 47 C.F.R § § 90.901-90.913 (800 MHz Specialized Mobile Radio Service (SMR)); 47 C.F.R § § 90.1001-90.1025 (220 MHz Service); 47 C.F.R § § 100.71-100.80 (Direct Broadcast Satellite (DBS)).

FN3. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994) ("Competitive Bidding Second Report and Order"). See also

Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994).

FN4. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Proceeding, WT Docket No. 97-82, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, 12 FCC Rcd 5686 (1997) ("Part 1 Notice of Proposed Rule Making").

FN5. Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374 (1997) ("Part 1 Third Report and Order" and "Second Notice"). In this same proceeding, on December 13, 1999, the Commission released Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Third Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 14 FCC Rcd 21558 (1999) (seeking comment on proposed amendments to Section 1.2105(c)(1) of the Commission's rules, which prohibits collusion between competing bidders).

FN6. A list of the parties that filed pleadings in response to the Part 1 Third Report and Order, and the abbreviations used to refer to such parties, is attached at Appendix B.

FN7. The installment payment rules are generally codified at 47 C.F.R. § 1.2110.

FN8. See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of

the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, Notice of Proposed Rulemaking, 13 FCC Rcd 9672 (1998) ("ULS Notice").

FN9. 47 C.F.R. § 1.2105(c)(1).

FN10. See, e.g., C, D, E, & F Broadband PCS Auction, March 23, 1999, Bidder Information Package at 109; Location and Monitoring Service Auction, December 15, 1998, Bidder Information Package at 61; The Phase II 220 MHZ Service Auction, September 15, 1998, Bidder Information Package at 65.

FN11. See, e.g., "Auction of 168 Local Multipoint Distribution Service Licenses; Status of Applications to Participate in the Auction," Public Notice, DA 99-639 (rel. April 5, 1999); "Auction of C, D, E, and F Block Broadband PCS Licenses; Status of Applications to Participate in the Auction," Public Notice, DA 99-375 (rel. February 24, 1999); "Auction of 528 Multilateration Location and Monitoring Service Licenses; Status of Applications to Participate in the Auction," Public Notice, DA 99-249 (rel. January 29, 1999); Auction of 156-162 MHz VHF Public Coast Station Licenses; Status of Applications to Participate in the Auction," Public Notice, DA 98- 2248 (rel. November 6, 1998).

FN12. See Letter to Ari Fitzgerald, Federal Communications Commission, from Louis Gurman, dated April 14, 1999. The Commission is also seeking comment in a separate proceeding on other proposed amendments to Section 1.2105(c)(1) of the Commission's rules. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Third Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 14 FCC Rcd 21558 (1999).

FN13. See "Wireless Telecommunications Bureau Responds to Questions About Local Multipoint Distribution Service Auction," Public Notice, DA 98-37 (rel. January 9, 1998) (stating that "[a]fter the deadline for submission of the FCC Form 175, applicants may not discuss the substance of their bids or bidding strategies with other bidders ....").

FN14. Part 1 Third Report and Order, 13 FCC Rcd at 417, ¶ 73. The majority of commenters supported our ownership disclosure requirements. Id. at 418, ¶ 74.

FN15. Id. at 417-18, ¶ 73.

FN16. 47 C.F.R. § 1.2112.

FN17. See 47 C.F.R. § 24.813 (1997). This section was subsequently removed from the Code of Federal Regulations. See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, Report and Order, 13 FCC Rcd 21027 (1998).

FN18. See Part 1 Third Report and Order, 13 FCC Rcd at 418-19, ¶ 75.

FN19. A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either de jure or de facto control. See infra ¶ ¶ 58-67 (discussing the "controlling interest" standard).

FN20. By limiting the reporting requirement in (b)(1) to only those applicants claiming designated entity status, this revision responds to AT&T's argument that the requirement is overly burdensome for large publicly-held corporations that may have hundreds of officers and directors. See AT&T Comments at 4.

FN21. See Part 1 Third Report and Order, 13 FCC Rcd at 418, 420, ¶ ¶ 75, 77.

FN22. 47 C.F.R. § 1.2112(a)(3) as adopted in the Part 1 Third Report and Order.

FN23. Id.

FN24. See 47 C.F.R. § 1.2112(a)(6) as adopted herein. Note that (a)(3) is renumbered as (a)(6) in the revised rule.

FN25. See 47 C.F.R. § 1.2112(a)(4) as adopted herein.

FN26. See 47 C.F.R. § 1.2112(a) as adopted herein.

FN27. ULS Notice, 13 FCC Rcd 9672 (1998).

FN28. AT&T Comments at 4-5; BAM Comments at 12; FCBA Comments at 28-29; FCBA Reply Comments at 19-22.

FN29. AT&T Comments at 5; BAM Comments at 12; FCBA Reply Comments at 20-21. Section 1.2112(a) of our rules requires applicants to disclose various stock interests of 10 percent or greater. 47 C.F.R. § 1.2112(a). Note that for

purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. See Part 1 Third Report and Order, 13 FCC Rcd at 419 n.207.

FN30. See id. at 418, ¶ 74.

FN31. Part 1 Third Report and Order, 13 FCC Rcd at 417, ¶ 73.

FN32. Id. at 417-18, ¶ 73. For purposes of our anti-collusion rules, the term "applicant" is defined to include entities that have a 10 percent or greater interest in the applicant. 47 C.F.R. § 1.2105(c)(6)(i).

FN33. See, e.g., 47 C.F.R. § § 20.6(d) (CMRS spectrum cap), 22.942(d) (cellular cross-interest), 73.3555 Note 2 (broadcast multiple ownership), 76.501 Note 2 (cable cross-ownership).

FN34. FCBA Reply Comments at 21; AT&T Comments at 5.

FN35. See 47 C.F.R. § 1.2112(b); compare 47 C.F.R. § 1.2112(a) with § 1.2112(b).

FN36. See 47 C.F.R. § 24.813 (1997). This section was subsequently removed from the Code of Federal Regulations.

See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, Report and Order, 13 FCC Rcd 21027 (1998).

FN37. See AT&T Comments at 5.

FN38. 47 C.F.R. § 1.2104(g)(1).

FN39. Id.

FN40. See, e.g., "VHF Public Coast Service Auction Closes," Public Notice, DA 98-2542, Attachment C, (rel. December 16, 1998); "Phase II 220 MHz Service Auction Closes," Public Notice, DA 98-2143, Attachment C, (rel. October 23, 1998); "LMDS Auction Closes," Public Notice, DA 98-572, Attachment C, (rel. March 26, 1998); "D, E, and F Block Auction Closes," Public Notice, DA 97-81, Attachment B, (rel. January 15, 1997).

FN41. Competitive Bidding Second Report and Order, 9 FCC Rcd at 2389-91, ¶ ¶ 231-240.

FN42. 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(i) and (ii) (1994). See also Public Notice. "Reminder to Licensees with Installment Payment Plans: Availability of Grace Periods," 12 FCC Rcd 7971 (1997).

FN43. 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(ii) (1994). In determining whether to grant a request for a grace period, the Commission (or Wireless Telecommunications Bureau upon

delegated authority) considered, among other things, the licensee's financial condition and payment history, including whether the licensee had previously defaulted. Id.

FN44. 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(ii) (1994).

FN45. 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(ii) (1994).

FN46. Part 1 Third Report and Order, 13 FCC Rcd at 434-42, ¶ ¶ 103-113.

FN47. A summary of the Part 1 Third Report and Order appeared in the Federal Register on January 15, 1998. See 63 Fed. Reg. 2315 (1998).

FN48. Part 1 Third Report and Order, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(i).

FN49. Part 1 Third Report and Order, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(ii).

FN50. Part 1 Third Report and Order, 13 FCC Rcd at 438, ¶ 107; 47 C.F.R. § 1.2110(f)(4)(iii), (iv).

FN51. See Part 1 Third Report and Order, 13 FCC Rcd at 441-442, ¶ 113 (stating that "[w]e further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests"). See also Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, Order, Memorandum Opinion and Order and Notice of Proposed

Rulemaking, 13 FCC Rcd 19064, 19072, ¶ 11 (1998) (218-219 MHz Service Order and NPRM); Public Notice, "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," DA 98- 1897, at 3 (rel. Sept. 18, 1998).

FN52. See generally Alpine PCS Petition; CONXUS Petition.

FN53. See generally DiGiPH Petition; Houston 936 Petition.

FN54. See NextWave Petition at 3. We specifically considered, and declined to adopt, such an alternative late payment structure in the Part 1 Third Report and Order, 13 FCC Rcd at 438-439, ¶ ¶ 108-109 (in response to comments filed by Airadigm (270-day window) and GWI (pro-rated late payment fees)).

FN55. See generally CTI Petition and Loli Petition. Accord In-Sync Comments at 1; Bellingham Comments at 3. On a related matter, the Loli Petition at 3-7 requests that the Commission (1) suspend all payment obligations of 218-219 MHz Service licensees until resolution of the proposals set forth in the Petition for Rulemaking of Euphemia Banas, et al. (filed September 4, 1996, amended January 28, 1997, February 26, 1997, and March 13, 1998) ("RM-8951"); and (2) give licensees in the 218-219 MHz Service a range of options for alleviating financial difficulties similar to those given to broadband PCS C block licensees (see Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees. WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345, 8358-60, ¶ ¶ 34-37 (1998) ("C Block Order on Reconsideration ")). Accord In-Sync Comments at 3-6; Bellingham Comments at 3-4. Although the Commission did not suspend the payment obligations of 218-219 MHz Service licensees, it decided not to assess late payment fees or cancel

218-219 MHz Service licenses for which a properly filed grace period request was pending, or for which adequate installment payments were made as of the effective date of the new Part 1 grace period rules (i.e., March 16, 1998), until resolution of the issues raised in RM-8951. See 218-219 MHz Service Order and NPRM, 13 FCC Rcd at 19073, ¶ 13. In light of these actions, Loli's requests described above are moot. See also Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, RM-8951, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999) (adopting a restructuring plan for existing 218- 219 MHz Service licensees that (i) were current in installment payments; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules).

FN56. See 47 C.F.R. § 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)).

FN57. See, e.g., DiGiPH Petition at 2, 4-5; In-Sync Comments at 6.

FN58. Alpine PCS Petition at 2-3; CONXUS Petition at 3; NextWave Petition at 2- 3.

FN59. Part 1 Third Report and Order, 13 FCC Rcd at 440, ¶ 110 (citing, e.g., Eldon H. Reiley, Guidebook to Security Interests in Personal Property § 4.02(iii) (1989)) (emphasis added).

FN60. See CTI Petition at 5-11. See also Alpine PCS Petition at 3-5; CONXUS Petition at 3-7; DiGiPH Petition at 2; Houston 936 Petition at 3-4. Accord In-Sync Comments at 6-7.

FN61. CTI Petition at 5-9.

FN62. CONXUS Petition at 4 (citing 5 U.S.C. § 551(4)) (emphasis added).

FN63. For example, in Bowen v. Georgetown University Hospital, 488 U.S. 209, 219-20 (1988), Justice Scalia gave the following illustration of a regulation that was not improperly retroactive under the APA:

The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable – whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, i.e., in the sense of altering the past legal consequences of past actions. Rather, it is what has been characterized as "secondary" ... A rule with exclusively future effect ... can unquestionably affect past transactions (rendering previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

Accord Bell Atlantic Tel. Cos. v. FCC, 79 F.3d 1195 (D.C. Cir. 1996) (upholding FCC rule changes that did not require carriers to refund sums previously collected, but which used past facts in setting the carriers' sharing obligations for the future period).

FN64. DirectTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499 (1994)). "'Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; ...."DD' Id. (quoting Landgraf, 511 U.S. at 270 n.24).

FN65. See, e.g., Chemical Manufacturers Ass'n v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989):

It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.

FN66. See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding prospective regulations limiting multi-media ownership under the FCC's general rulemaking powers, including requirement for divestiture as a condition to license renewal); Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking); WBEN, Inc. v. United States, 396 F.2d 601, cert. denied, 393 U.S. 914 (1968) (upholding license modifications that limited predawn AM broadcasting rights of "daytimer" licensees that previously had some of the more ample privileges granted to "fulltimer" licensees).

FN67. See Houston 936 Petition at 1-3. See also DiGiPH Petition at 5 (referencing C block notes); Alpine PCS Petition at 6-7 (same). Cf. NextWave Petition at 5-7 (Commission should reconcile its seemingly conflicting roles of regulator and party to commercial contract).

FN68. See CONXUS Petition at 7-8; CTI Petition at 8-9. See also In-Sync Comments at 6.

FN69. 47 C.F.R. § 95.816.

FN70. 47 C.F.R. § 24.711.

FN71. 47 C.F.R. § 24.716.

FN72. See American Personal Communications Washington-Baltimore MTA #10 Frequency Block A, File No. 15000-CW-L-94, Call Sign: KNLF200, Order, 11 FCC Rcd 12384 (1996).

FN73. 47 C.F.R. § 24.309.

FN74. 47 C.F.R. § 90.812.

FN75. 47 C.F.R. § 21.960.

FN76. 218-219 MHz Service Order and NPRM, 13 FCC Rcd at 19072-19074, ¶ ¶ 12- 14.

FN77. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, RM-8951, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (adopting a restructuring plan for existing 218-219 MHz Service licensees that (i) were current in installment payments; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules).

FN78. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 8345, 8373, ¶ 65 (1998); see also Amendment of the

Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 97-82, 12 FCC Rcd 16463 (1997).

FN79. See Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 41.04 at page 41-66 (observing that the lower courts have unanimously permittedagencies to modify existing licenses through APA rulemakings).

FN80. MDS and SMR Security Agreements at ¶ 11.

FN81. See Association of Accredited Cosmetology v. Alexander, 979 F.2d 859, 863-66 (D.C. Cir. 1992):

Member schools have no "vested right" to future eligibility to participate in the GSL program. Although we do not doubt AACS's submission that the schools expected to be eligible in the future, such an expectation did not constitute a vested interest. Nowhere in the Program Participation Agreements are member schools promised or even led to believe that there will be no background changes in the federal law. The Agreements explicitly provide that participating schools must "comply will all relevant program statutes and regulations." (Emphasis added.)

FN82. MDS and SMR Notes at p. 5

The enforceability of the Note and/or the Security Agreement do not alter the rights and obligations of the Maker and Payee under the Communications Act of 1934, as amended, or under the then-applicable orders and regulations of the Commission, as amended.

* * *

This Note shall be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of the

Commission, and federal law, Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and nothing in this Note shall be deemed to release the Maker from compliance therewith. (Emphasis added.)

FN83. For example, the MDS and SMR Notes provide at p. 2:

All payments shall be made during normal business hours at the Commission's designated lockbox location as set forth from time to time in the Commission's then-applicable orders and regulations and/or public notices.

FN84. MDS and SMR Notes at p. 2.

FN85. MDS and SMR Notes at p. 5.

FN86. Some petitioners argue that the Supreme Court decision in United States v. Winstar Corp., 518 U.S. 839 (1996), precludes the unilateral modifications of the terms of the Note and Security Agreement. See, e.g., Alpine PCS Petition at 6; CONXUS Petition at 7. Winstar addressed an entirely different regulatory scheme, and one in which the Court found that the government agreed to protect private parties from the risk of changing regulations. Here, in contrast, the Note and Security Agreement put the licensees on notice that they must continue to comply with the Commission's regulations, as the may be amended. Alpine PCS, CONXUS and other petitioners do not, and cannot, point to any provision in the Notes and Security Agreements in which the government affirmatively promised not to make any regulatory changes that would affect the licensees during the 10-year life of the licenses. Accordingly, the Winstar decision has no application to the circumstances here.

FN87. While the instant reconsideration petitions were under

consideration, we informally allowed SMR and MDS licensees to make installment payments under a modified regime in which licensees in these services were not charged a late fee if the payment was made within 90-days of the due date (as provided for in the text of the SMR and MDS Notes), and in which a 10 percent late fee was imposed for payments that were made within the 90-180 day period (as provided for in the new Part 1 rules). We did this as an accommodation to these licensees so as not to prejudice their argument that the Note and Security Agreement provisions restricted the Commission to the old Part 1 rules, at least for the first 90-day period. Now that we have completed our review on reconsideration, we see no reason to continue that special procedure, since we have concluded that the Note and Security Agreements do not preclude the adoption of new grace period and payment rules for the future. While we will not seek to recover the amounts that might otherwise have been due for late payments under our Part 1 rules during this reconsideration period, we will commence applying the Part 1 rules uniformly to all services, including SMR and MDS, beginning with the first installment payment due after the effective date of this rule making.

FN88. Part 1 Third Report and Order, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)).

FN89. See 47 C.F.R. § 1.2110(g)(4) as adopted herein.

FN90. See 47 C.F.R. § 1.2110(g)(4) as adopted herein. These amendments of the due dates for late installment payments and associated late fees do not apply to C and F block licensees that were provided a single 90-day non- delinquency period for remittance of the initial resumption payment that was due on July 31, 1998. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS)

Licensees, WT Docket No. 97-82, Order on Reconsideration of the Second Report and Order, 13 FCC Rcd at 8355, ¶ 26.

FN91. See 47 C.F.R. § 1.2110(g)(4) as adopted herein. These late payment fee and automatic cancellation provisions do not apply to licensees with grace period requests that were properly filed prior to the effective date of the Part 1 Third Report and Order (March 16, 1998) until such time as the Commission (or the Bureau upon delegated authority) addresses those grace period requests.

FN92. Competitive Bidding Second Report and Order, 9 FCC Rcd at 2391, ¶ 240 (emphasis added).

FN93. Section 1.2110(e)(4)(ii) provided in part: "If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule ...." 47 C.F.R. § 1.2110(e)(4)(ii) (1997).

FN94. NextWave Petition at 4. See also Loli Petition at 7-8 (requesting that 218-219 MHz Service licensees be allowed to continue filing requests for "work- outs").

FN95. NextWave Petition at 5.

FN96. See 47 C.F.R. § 1.2110(g) as adopted herein.

FN97. 47 C.F.R. § 1.2110(e)(4)(ii) (1997).

FN98. See Part 1 Notice of Proposed Rule Making, 12 FCC Rcd at 5723-5726, ¶ ¶ 71-74.

FN99. See Part 1 Notice of Proposed Rule Making, 12 FCC Rcd at 5723-5726, ¶ ¶ 69-78.

FN258. See 5 U.S.C. § 604. The RFA, see 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

FN259. See 5 U.S.C. § 603

APPENDIX A

Final Rules

Part 1 of title 47 of the Code of Federal Regulations is revised to read as follows:

1. Section 1.2104 is amended by revising paragraphs (g)(1) and (g)(2) to read as follows:

§ 1.2104 Competitive bidding mechanisms.

* * * * *

(g) * * *

(1) Bid withdrawal prior to close of auction. A bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the

difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment equal to 3 percent of the amount of their bid withdrawals. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed at the close of the subsequent auction of the license.

Example: (1) Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $90 and withdraws. In that same auction, Bidder C wins the license at a bid of $95. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100 - $95). Bidder B owes nothing.

Example: (2) Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $95 and withdraws. In that same auction, Bidder C wins the license at a bid of $90. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100 - $95). Bidder B owes $5 ($95 - $90).

Example: (3) Bidder A withdraws a bid of $100. Subsequently, in that same auction, Bidder B places a bid of $90 and withdraws. In a subsequent auction, Bidder C places a bid of $95 and withdraws. Bidder D wins the license in that auction at a bid of $80. Withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission

assessment of a final withdrawal payment (Bidder A would owe 3% of $100, or $3, and Bidder B would owe 3% of $90, or $2.70). At the end of the second auction, Bidder A would owe $5 ($100 - $95) less the $3 interim withdrawal payment for a total of $2. Because Bidder C placed a subsequent bid that was higher than Bidder B's $90 bid, Bidder B would owe nothing. Bidder C would owe $15 ($95 - $80).

(2) Default or disqualification after close of auction. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) of this section plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1) of this section, the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

* * * * *

2. Section 1.2105 is amended by revising paragraphs (a)(2)(xi) and (c)(1) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

* * * * *

(a)(2) * * *

(xi) An attached statement made under penalty of perjury

indicating whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency.

* * * * *

(c) Prohibition of collusion. (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the short-form application filing deadline, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

* * * * *

3. Section 1.2106 is amended by revising paragraph (a) to read as follows:

§ 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that has previously been in default on any Commission license or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

* * * * *

4. Section 1.2108 is amended by revising paragraph (b) to read as follows:

§ 1.2108 Procedures for filing petition to deny against long-form applications.

* * * * *

(b) Within a period specified by Public Notice, and after the Commission by Public Notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. The period for filing petitions to deny shall be no more than ten (10) days. The appropriate licensing Bureau, within its discretion, may, in exigent circumstances, reduce this period of time to no less than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

* * * * *

5. Section 1.2110 is amended by redesignating paragraphs (b) through (m) as (c) through (n), adding new paragraph (b), and revising newly redesignated paragraphs (c), (g)(4), and (j) to read as follows:

§ 1.2110 Designated entities.

* * * * *

(b) Eligibility for small business provisions.

(1) Size attribution. The gross revenues of the applicant (or licensee), its controlling interests and their affiliates shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. An applicant seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and their affiliates for each of the previous three years.

(2) Aggregation of affiliate interests. Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

Example 1: ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A&B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2: ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions. (i) Small business consortia. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business consortium member shall not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital

requirements of the particular service.

(2) Controlling interests. (i) For purposes of this section, controlling interest includes individuals or entities with either de jure or de facto control of the applicant. De jure control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of certain interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate,

will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have a controlling interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if

such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non- controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of Black or African American, Hispanic or Latino, American Indian or Alaskan Native, Asian, and Native Hawaiian or Pacific Islander extraction. See Office of Management and Budget, Revisions to Standards for the Classification of Federal Data on Race Ethnicity, Notice of Decision, 62 FR 58782 (October 30, 1997).

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(g) * * *

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the "Required Installment Payment") may submit such payment on or before the last day of the next quarter (the "first additional quarter") without being considered delinquent. Any licensee making its Required Installment Payment during this period (the "first additional quarter grace period") will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the "second additional quarter grace period") will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace

periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement," with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph (g)(4)(ii) of this section, is more than ninety (90) days delinquent.

* * * * *

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, establishing, as applicable, de facto or de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

* * * * *

6. Section 1.2112 is revised to read as follows:

§ 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each applicatio.. participate in competitive bidding (i.e., short-form application (see 47 CFR 1.2105)), or for a license, authorization, assignment, or transfer of control shall disclose fully the real party or parties in interest and must list the following information:

(1) The name, address, and citizenship of any party holding 10 percent or more of stock in the applicant, whether voting or nonvoting, common or preferred, including the specific amount of the interest or percentage held.

(2) In the case of a limited partnership, the name, address and citizenship of each limited partner whose interest in the applicant is 10 percent or greater (as calculated according to the percentage of equity paid in or the percentage of distribution of profits and losses);

(3) In the case of a general partnership, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(4) In the case of a limited liability company, the name, address and citizenship of each of its members whose interest in the applicant is 10 percent or greater.

(5) All parties holding indirect ownership interests in the applicant as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated and reported as if it were a 100 percent interest.

(6) Any FCC-licensed entity or applicant for an FCC license, in which the applicant or any of the parties identified in

subparagraphs (1) through (5) of above, owns 10 percent or more of stock, whether voting or nonvoting, common or preferred. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant (e.g., Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C, then Companies A and C must be listed on Company B's application, where C is an FCC licensee and/or license applicant);

(b)Designated Entity Status: In addition to the information required under paragraph (a) of this section, each applicant claiming eligibility for small business provisions shall disclose the following:

(1) On its application to participate in competitive bidding (i.e., short- form application (see 47 CFR 1.2105)),

(i) List the names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant, as described in § 1.2110;

(ii) List any FCC-licensed entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(2) As an exhibit to its long-form application (i.e., see 47 CFR 1.2107):

(i) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable

designated entity provisions, including the establishment of de facto or de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(ii) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(iii) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium.

APPENDIX B

List of Parties

I. Order on Reconsideration

Petitions for Reconsideration

Alpine PCS, Inc., et al. ("Alpine PCS")

Community Teleplay, Inc. ("CTI")

DiGiPH PCS, Inc. ("DiGiPH")

Loli, Inc. et al. ("Loli")

NextWave Telecom Inc. ("NextWave")

Petition for Limited Reconsideration and Clarification

CONXUS Communications, Inc. ("CONXUS")

Petition for Partial Reconsideration

Houston 936 SMR, Inc. ("Houston 936")

Comments

Bellingham Corporation and Pueblo Communications, Inc. ("Bellingham")

In-Sync Interactive/Akron, Inc. et al. ("In-Sync")

Comments on Section 1.2112 Filed in Universal Licensing System Proceeding

Comments of AT&T Wireless Services, Inc. ("AT&T")

Comments of Bell Atlantic Mobile, Inc. ("BAM")

Comments of The Federal Communications Bar Association ("FCBA")

Reply Comments of The Federal Communications Bar Association

II. Fifth Report and Order

Comments

AmeriCall International, LLC ("AmeriCall")

Cook Inlet Region, Inc. ("CIRI")

National Telephone Cooperative Association ("NTCA")

NextWave Telecom Inc. ("NextWave")

Rural Telecommunications Group ("RTG")

Western Wireless Corporation ("Western")

Reply Comments

Western Wireless Corporation ("Western")

Ex Parte Filing

Small Business Administration

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1400

September Term, 2001

Celtronix Telemetry, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

Consolidated with 00-1401

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of Celtronix Telemetry, Inc.'s petition for rehearing en banc and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer Clerk
BY:
Michael C. McGrail Deputy Clerk

5 U.S.C. §551(4) Administrative Procedure Act

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

28 U.S.C. §309(j) Communications Act

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission -

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that -

(i) are used to protect the safety of life, health, or property; and

(ii)are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the

benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed -

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall -

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote

(i) an equitable distribution of licenses and services among geographic areas,

(ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and

(iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members

of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b)and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall -

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C)diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D)be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the

development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraph (B), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of

conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding -

(i) the deposits of successful bidders shall be paid to the Treasury;

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(9) Use of former Government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that -

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 921 et seq.).

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless -

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923 (d)(1));

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act (47 U.S.C. 923 (a)); and

(iv) the Commission has completed the rulemaking required by section 332 (c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection

on and after 2 years after August 10, 1993, shall cease to be effective if -

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(a));

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act (47 U.S.C. 924(a));

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act (47 U.S.C. 925(a));

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2007.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report -

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent -

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to

rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by -

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms

of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the

Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall -

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii)include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications

In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994) -

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to -

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial television broadcast licenses

A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006.

(B) Extension

The Commission shall extend the date described in subparagraph (A) for any station that requests such extension in any television market if the Commission finds that -

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

(ii) digital-to-analog converter technology is not generally available in such market; or

(iii)in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market -

(I) do not subscribe to a multichannel video programming distributor (as defined in section 522 of this title) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either -

(a) at least one television receiver capable of receiving

the digital television service signals of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

(C) Spectrum reversion and resale

(i) The Commission shall -

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A) or (B), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection. The Commission shall complete the assignment of such licenses, and report to the Congress the total

revenues from such competitive bidding, by September 30, 2002.

(D) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (C)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not -

(i) preclude any party from being a qualified bidder for such spectrum on the basis of -

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II)the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

47 C.F.R.§1.2110(d)(1994) Installment Payments

The Commission may permit small businesses, including small businesses owned by women and minorities and rural telephone companies that qualify as small businesses, that

are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in §1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to §1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable for penalties pursuant to §1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Such plans will:

(i) impose interest based on the rate of the U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction buildout requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules.

47 C.F.R. §1.2110(f)(4)(1998) Installment Payments

A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan. (i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's ``Note and Security Agreement.'' Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments. (ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in paragraph (i) of this section, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the

conclusion of the grace period. (iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in paragraph (f)(4)(ii) of this section, is more than ninety (90) days delinquent. (iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

]

WT Docket No. 97 - 82

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 1 of the
Commission's Rules -
Competitive Bidding Procedures

To: The Commission

PETITION FOR RECONSIDERATION

Submitted by:
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January 30, 1998

RECEIVED JAN 30 1998

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SUMMARY

Community Teleplay, Inc. ("CTI"), by its attorneys, hereby petitions the Commission to reconsider the amendments to Part 1 of the Commission's rules set forth in the Third Report and Order, WT Docket No. 97-82, which eliminate grace period requests in favor of automatic grace periods for current licensees making installment payments to the Commission. The amendments to Section 1.2110(e) should not apply to IVDS licensees currently making payments under the Commission's installment payment program, because such amendments constitute an impermissible retroactive rulemaking.

When choosing the installment payment program, eligible IVDS licensees entered into a financial agreement with the Commission for the payment of their license. The Commission issued a license in exchange for the licensee's promise to make installment payments. Former Section 1.2110(e) of the Commission's rules sets forth the rights and obligations of the parties to that agreement with respect to payment, default and grace period requests. The Commission cannot unilaterally change the terms of the agreement by retroactive rulemaking. Therefore, the amended Section 1.2110(e) set forth in the Third Report and Order cannot apply to the Commission's financial agreements with IVDS licensees.

WT Docket No. 97 – 82

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Amendment of Part 1 of the
Commission's Rules -
Competitive Bidding Procedures

To: The Commission

PETITION FOR RECONSIDERATION

1. Community Teleplay, Inc. ("CTI"), by its attorneys, hereby petitions the Commission to reconsider the amendments to Part 1 of the Commission's rules set forth in the Third Report and Order, WT DocketNo. 97-82, which eliminate grace period requests in favor of automatic grace periods for current licensees making installment payments to the Commission.[1] The amendments to Section 1.2110 Ce)[2] should not apply to IVDS licensees currently making payments under the Commission's installment payment program, because such amendments constitute an impermissible retroactive rulemaking.

I. BACKGROUND

2. CTI is the Interactive Video and Data Service ("IVDS") licensee for the Norfolk-Virginia Beach area (NSA Market No. 43 segment B) . CTI obtained its license in the Commission's 1994 IVDS auction where it qualified as a small business designated entity and elected to pay its bid amount through the Commission's installment payment plan.

3. As the Commission is aware, the IVDS industry has encountered unforseen obstacles that have caused the

industry to reinvent itself. The Commission allocated the IVDS spectrum to serve as a return path from TV set-tops for interactive television ("ITV") applications.[3] ITV equipment and application developers, however, failed to develop commercially viable equipment and applications, thereby forcing IVDS licensees to start from ground zero in developing this spectrum.

4. CTI believes that IVDS holds great potential. CTI has worked diligently to build out a commercially viable IVDS system. It is making progress. CTI is in the process of deploying its first IVDS cell site in the Norfolk—Virginia Beach MSA which will be used to demonstrate a state-of-the—art vehicle tracking service. Three and one—half years after the July, 1994 IVDS auction, commercially viable, IVDS equipment has only now become available for CTI to deploy in its market. CTI estimates that it will take a similar length of time to develop its IVDS network into a successful business. CTI submits that its situation that of a small business that has had to completely start over following the failure of IVDS-based ITV — is precisely the type of situation that creates the "financial distress" that the former grace period provisions were meant to accommodate and which the amended rules do not. CTI, in anticipation of defaulting on its installment payments, has filed grace period requests pursuant to the current Section 1.2110(e) (4) (ii) of the Commission's rules for installment payments that are or will become due.[4]

5. Section 1.2110(e) (4) (i) states that an entity making installment payments will be in default if it fails to make payment within 90 days of the payment due date. 47 C.F.R. 1.2110(e) (4) (i) Current Section 1.2110 Ce) (4) (ii) states that:

> [u]pon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In

> considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build—out requirements, [and] the licensee's financial condition . . .

47 C.F.R. § 1.2110(e) (4) (ii) (1997) . Thus, licensees making installment payments had an automatic 90 days to make delinquent payments without being in default, and then if circumstances warranted, the licensee could request that the Commission grant the licensee an additional 90-180 days. Further, the Commission's rules do not limit the number of grace period requests that can be filed in conjunction with a delinquent installment payment.[5] Therefore, if the Commission granted an initial 6 month grace period request, the licensee was entitled to file another request before the expiration of that period upon anticipation of default, thereby extending the period for making payment.

6. In the Third Report and Order, the Commission declared that from this point forward that it will no longer accept filings for grace period requests.[6] Instead, licensees making installment payments will be given the automatic 90 day period contained in Section 1.2110(e) (4) (i) and an additional 90 day automatic grace period to make payment.[7] If payment is not made before the expiration of these two periods, then the licenses will be canceled.

7. These grace period provisions only apply to existing licensees currently making installment payments, because the Commission is not using installment payment plans for auctions scheduled in the future. For licensees with pending grace period requests, the Commission will not consider them in default for those installment payments until the Bureau rules on the requests.[8] If a request is denied, then the licensee "will have ten (10) business days to make the

required payment or be considered in default."[9] As demonstrated below, CTI's ability to submit grace period requests cannot be eliminated by retroactive rulemaking.

II. ARGUMENT

A. A Rule That Modifies The Terms Of Current Installment Payment Agreements With IVDS Licensees Is Impermissibly Retroactive

8. Prior to the July, 1994 IVDS auction, the Commission released the Fourth Report and Order establishing the rules and procedures for the IVDS auction.[10] Specifically, the Commission permitted the use of installment payment plans for eligible small businesses and stated that the general procedures provided in the Second Report and Order, which originally established Section 1.2110, applied.[11] In addition, the Commission pointed out that grace periods for licensees– a provision only applicable to installment payment plans– would be considered on a case—by-case basis.[12] Nothing in the Fourth Report and Order indicated that the terms and conditions of the installment payment plans would be subject to subsequent amendments of the Commission's rules. [13]

9. If the terms of the financing arrangement are uncertain and subject to change, then designated entities will not be able to structure a business plan or obtain investors, which runs counter to the Commission's intent "to promote the participation of designated entities in the provision of spectrum—based services.[14]

10. When choosing the installment payment program, eligble IVDS licensees entered into a financial agreement with the Commission for the payment of their license. The Commission issued a license in exchange for the licensee's promise to make installment payments. Former Section 1.2110(e) specifies the rights and obligations of the parties to that agreement. The Commission cannot unilaterally change the terms of the agreement by retroactive

rulemaking. Therefore, the amended Section 1.2110(e) set forth in the Third Report and Order cannot apply the Commission's financial agreements with IVDS licensees.

11. The Administrative Procedure Act ("APA") prohibits the Commission from applying a rule retroactively.[15] A rule is impermissibly retroactive if it impairs the rights a party possessed when it acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already passed.[16]

12. Eligible IVDS licensees, such as CTI, entered into a financial agreement with the Commission for their licenses.[17] As set forth in the bidder's information package and the IVDS licenses, section 1.2110 governed the rights and obligations of the parties concerning payment, default and grace period requests. The Commission did not inform licensees in the agreement or prior to entering the agreement that the terms of the installment payment plan would be subject to unilateral modification by the Commission. The rights and obligations of the parties vested at the auction. The Commission cannot eliminate or alter the rights of a party or impose new obligations in a subsequent rulemaking without violating the A.PA and the basic principles of contract law.

13. The amendment of Section 1.2110(e) by the Commission in the Third Report and Order impairs the right of a current IVDS licensees with an installment payment agreement to request for extensions of time for making payments and imposes new duties for IVDS licensees with financial agreements that were entered into in 1995. A grace period request does not guarantee an extension of time or a restructuring of payments, but it does provide for determination based on the unique circumstances of a license that is subject to judicial review. In addition, more than one request for an extension of a single installment payment can be filed.[18] Circumstances may justify a greater extension of time than allowed under the new automatic grace period provisions, especially for IVDS licenses.[19] Therefore, former Section 1.2110(e) has the potential to provide a licensee with

more relief than the new automatic 90 day grace period provisions. Further, the amended Section 1.2110(e) imposes a penalty fee on licensees who make payment during either of the two automatic 90 day periods.[20] Under the old rule, a licensee is liable only for interest accrued during the initial automatic 90 day period and any grace periods that are granted by the Commission.[21]

14. Recent D.C. Circuit decisions regarding retroactivity are not applicable to CTI's situation.[22] Those cases, with the exception of DIRECTV, dealt with pending license applications filed by individuals under rules that were subsequently modified in a Commission rulemaking. the Commission then proceeded to dismiss the pending applications. The court found that the Commission's dismissal of the applications under the amended rule was not impermissibly retroactive, because no right had vested in the applicant upon the filing of an application.[23] The applicants, therefore, were not entitled to have their applications granted by the Commission. In DIRECTV, the Commission's promise to allocate channels to petitioners in the future did not vest petitioners with a right in any specific channel.[24] The "promise" was not a promise at all, but a statement of policy resulting from an adjudicatory proceeding[25]. Therefore, the Commission's subsequent rules to auction the channels instead of allocating them: to the petitioners was not impermissibly retroactive.[26]

15. In this case, the Commission is not attempting to apply the automatic grace period provisions to pending license applications filed by IVDS licensees. Further, CTI does not contend that the filing of a grace period request vests a licensee with certain rights. However, the financing agreements entered into by the Commission and IVDS licensees did vest in each party certain rights and obligations concerning the grant and payment for the license. The Commission cannot subsequently impair rights or alter obligations by a retroactive rulemaking.[27]

III. CONCLUSION

17. For the reasons stated above, the Commission must reconsider its amendment of the grace period provisions contained in Section 1.2110(e) (4) (ii) as set forth in the Third Report and Order as applied to IVDS licensees like CTI. Applying the amended grace period provisions to the current IVDS licensees making installment payments will result in an impermissible retroactive rulemaking in violation of the APA.

Respectfully submitted,
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Footnotes

[1] In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Third Report and Order, FCC 97—413 (released Dec. 31, 1997) [hereinafter Third Report and Order].

[2] See Third Report and Order at ¶ 106-07; 47 C.F.R. § 1.2110(e) (4) (ii) (1997).

[3] See In the Matter of Amendment of Parts 0, 1, 2, and

95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91—2, Report and Order, 7 FCC Rcd 1630 (1992).

[4]47 C.F.RL § 1.2110(e) (4) (ii) (1997). CTI's most recent grace period request was filed on March 21, 1997, and supplemented and amended by flings made on August 6, 1997 and October 8, 1997.

[5]"Where the Commission grants a grace period and the default is not cured at the conclusion of such a grace period, . . . the FCC may in its discretion extend or grant additional grace periods where circumstances warrant." Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, Public Notice, 10 FCC Rcd 10724 (1995).

[6] Third Report and Order at ¶ 106.

[7] Id. In the first 90 day period, licensees will be assessed a 5% late payment fee and in the second 90 day period a 10% late payment fee. Id.

[8]Id. at ¶ 113.

[9] Id.

[10] In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-252, Fourth Report and Order, 9 FCC Rcd 2330 (1994) [hereinafter Fourth Report and Order.

[11] In the Matter of Implementation of Section 309(j) of the Communications Act 11 Competitive Bidding, PP Docket No. 93—253, Second Report and Order, 9 FCC Rcd 2348, 2389, 2391 (1994) [hereinafter Second Report and Order].

[12] Fourth Report and Order at ¶ 54 n.91.

[13] "The Terms contained in the Commission Reports

and Orders and in the Bidder Package are not negotiable. Prospective bidders are urged to read, review and analyze the auction documents prior to bidding at the auction, to make certain that they completely understahd the provisions therein, and are willing to be bound by all of the Terms before making any bid." Bidder's Information Package at 1. A copy of the Commission's Fourth Report and Order was included with the Bidder's Information Package.

[14] Fourth Report and Order at ¶ 53. In the Third Report and Order, the Commission states that in the past it has emphasized to entities choosing the installment payment program that the term will be governed by current Commission rules and regulations amended. Third Report and Order at ¶ 111. However, this intet does not appear in IVDS. The Fourth Report and Order, establishing competitive bidding for IVDS, and subsequent public notices did not inform bidders and/or licensees that their financial agreement would be subject to modification. Further, unlike C blo broadband PCS licensees, the Commission did not provide IV licensees with a "Note and Security Agreement" stating that the terms of the installment payment plan would be subject amendments. Id.

[15] 5 U.S.C. § 551(4) (1994); Georgetown University Hospital Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987). "'[E]quitable considerations are irrelevant to the determination of whether the rule may be applied retroactively; such retroactive application foreclosed by the express terms of the APA.'" Chadmoore Comm Inc. v. FCC, 113 F.3d 235, 240 (D.C. Cir 1997) (quoting Georgetown 821 F.2d at 757).

[16] Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994); Chadmoore, 113 F.3d at 240—41.

[17] CTI does not assert that its license is a contract with the Commission. "[I]t is undisputed that an FCC license is not a contract between the licensee and the Commission." William L. Fishman, Property Rights, Reliance, and

Retroactivity Under the Communications Act of 1934, 50 Fed. Comm. L.J. 1, 32 (1997) However, the Commission's grant of a license is consideration for a promise from eligible IVDS licensees to make installment payments, thus creating a financing agreement between the parties.

[18]See supra note 5.

[19] As stated above, the IVDS industry has endured a dramatic turn of events that has caused the industry to reinvent itself.

[20] See supra note 7.

[21] 47 C.F.R. § 1.2110 (e) (4) (ii) (1997).

[22] See Chadmoore,. 113 F.3d at 235; DIRECTV, Inc. v. FCC, 110 F.3d 816 (D.C. Cir. 1997); Hispanic Info. & Telecomm. Network v. FCC 865 F.2d 1289 (D.C. Cir. 1989) .

[23] Chadmoore, 113 F.3d at 241; Hispanic, 865 F.2d at 1294—95..

[24] DIRECTV, 110 F.3d at 826.

[25] Id. at 822, 826.

[26] Id.

[27] The Commission cannot change a licensee's winning bid amount after the auction, and thus, it cannot change the terms of payment after the parties enter into an agreement. If the Commission wants to change the terms of current agreements, then it must renegotiate the terms with current IVDS licensees making installment payments for a modification. 5 U.S.C. § 551(4); Landaraf, 511 U.S. at 280.

FILED

MAY 16 2002

CLERK

No. 01-1504

IN THE

Supreme Court of the United States

CELTRONIX TELEMETRY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF PETITIONER

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FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA License, Final Down Payment Due by Sept. 24, 1996, Public Notice, 11 FCC Rcd 11316 (FCC 1996) 2

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), is a small, start-up business which was formed, along with several related companies, to acquire broadband Personal Communications Services ("PCS")[2] spectrum licenses to be auctioned by the Federal Communications Commission ("the Commission") and to thereafter build and operate a telecommunications network utilizing such electromagnetic spectrum. It has an interest in this petition because, just as the petitioner, Celtronix Telemetry, Inc. ("Celtronix"), it entered into a commercial lending transaction with the Commission for the purchase of electromagnetic spectrum licenses, subsequently encountered financial difficulties in making installment payments for the licenses through no fault of its own, and thereafter lost (or purportedly lost) its licenses when the Commission took unilateral action in contravention of the rules by which commercial transactions are typically governed.

Specifically, both Celtronix and UC-NC were recipients of spectrum licenses won through two of the earliest spectrum

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1. Both petitioner, Celtronix Telemetry, Inc., and the Solicitor General have consented to the filing of this brief and, in compliance with Supreme Court Rule 37.2, their letters of consent have been lodged with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. Broadband PCS makes possible a variety of mobile and portable radio services using such devices as small, lightweight, multifunction portable phones, portable fax machines, and advanced devices with two-way data capabilities that are competing with existing cellular, paging and other land mobile services.

auctions — the second and fifth[3] — ever conducted by the Commission, which was authorized to begin distributing spectrum through a competitive bidding process by Congress only in 1993. Both companies were entitled to finance a portion of their bids through installment payments under the Commission's auction rules designed to encourage small businesses; and both subsequently encountered difficulties in making the required installment payments, Celtronix due to a failure of interactive television technology and UC-NC due to a flooding of the broadband PCS market by the Commission.[4]

In the midst of these financial difficulties, both Celtronix and UC-NC were deprived by the Commission of relief which should have been available to them as participants in commercial transactions and both have now purportedly lost their spectrum licenses. In the Celtronix case the Commission has taken the

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3. Celtronix was awarded Interactive Video and Data Service ("IVDS") licenses in the second auction conducted by the Commission, *see* Petition, p. 3, and UC-NC was awarded C Block PCS licenses in the fifth auction, *see FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA License, Final Down Payment Due by Sept. 24, 1996,* Public Notice, 11 FCC Rcd 11316 (FCC 1996).

4. Other participants in the respective auctions also faced financial difficulties for similar reasons, and the Commission had to suspend temporarily all installment payments for the successful bidders in each of the two auctions. *See* Petition, p. 5; *In re Installment Payments for PCS Licenses*, Order, 12 FCC Rcd 17325 (FCC 1997). In both cases, prior to reinstating installment payments, the Commission provided the successful bidders with only limited options for dealing with the financial difficulties being faced. *See* Petition, p. 5; *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (FCC 1997).

position that it can unilaterally change the rules affecting grace periods, forcing Celtronix to surrender its licenses under protest. In the case of UC-NC the Commission contends that it has the power to revoke the licenses of PCS companies for failure to make installment payments while in bankruptcy[5] and, in accordance with this line of thinking, has revoked UC-NC's licenses.[6] Thus, one of the relevant issues in the Petition

5. On October 28, 1998, the date on which it was required to make payment to the Commission or suffer a default, UC-NC filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York and thereafter commenced an avoidance action by adversary complaint against the Commission to value the licenses as at the time UC-NC incurred the obligations to the Commission and avoid the difference as a fraudulent conveyance. *See Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.). UC-NC is still in Chapter 11 protection, and the adversary proceeding is still pending.

6. On October 6, 2000, UC-NC filed a petition for reconsideration of the Commission's announcement that the licenses previously awarded to UC-NC were revoked and were to be re-auctioned. *See In re Application of Urban Comm-North Carolina, Inc. for Reconsideration of Public Notice of C and F Block PCS Spectrum Auction, Petition for Reconsideration* (FCC Oct. 6, 2000) ("the UC-NC Reconsideration Petition"). The Commission has yet to decide the UC-NC Reconsideration Petition. In November 2001, UC-NC filed a petition for writ of mandamus ("the UC-NC Mandamus Petition") with the United States Court of Appeals for the District of Columbia Circuit ("the D.C. Circuit") directing that the Commission act forthwith upon the UC-NC Reconsideration Petition or that the Commission grant the relief requested in the UC-NC Reconsideration Petition. On March 26, 2002, the D.C. Circuit denied the UC-NC Mandamus Petition "without prejudice to renewal after the United States Supreme Court rules in *FCC v. NextWave Personal Communications, Inc.*, No. 01-653, *cert. granted*, 70 U.S.L.W. 3317 (2002)." *See In re Urban Comm-North Carolina, Inc.*, No. 01-1490 (D.C. Cir. Mar. 26, 2002).

affecting UC-NC is the extent to which the Commission, or any other governmental agency, can participate in commercial activity and agreements (here, selling electromagnetic spectrum licenses at their full commercial value and structuring the sales as typical commercial transactions) and thereafter negate any undesirable consequences of this commercial activity by unilateral decree and by claims, true or not, that its actions in doing so are regulatory.

SUMMARY OF ARGUMENT

The D.C. Circuit totally failed to address the implications arising from the commercial nature of the Commission's agreement with Celtronix to finance the purchase of spectrum licenses. The D.C. Circuit found that "the grace period change may have altered the value of the rights Celtronix acquired by its winning bid and commitment to make the required payments." *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001). In response to Celtronix's argument that the rule change amounted to a breach of contract, the D.C. Circuit simply stated that there was "a long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understandings to licenses acquired by auction." *Id.* at 590. Although that may be true, when the Commission purposely engages in commercial activity, that tradition must yield to the traditions governing such activity.

ARGUMENT

Having purposely crossed over into the commercial financing arena, even beyond any mandate by Congress, the Commission subordinated itself to the contract and other laws that regulate the affairs of parties to commercial

transactions. While Congress, in consonance with prevailing trends towards deregulation and reliance on market forces instead of presumed bureaucratic wisdom, and with a view towards containment of administrative costs and realization of revenue from the national resources,[7] authorized the Commission to allocate radio spectrum licenses by competitive bidding rather than, as in the past, by administrative adjudication or random allocation at no charge to the licensee for the license,[8] Congress did not mandate that the Commission become a party to financing transactions with the successful bidders:

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7. President Clinton proposed in his budget submitted to Congress [for fiscal year 1994] that the FCC be given authority to use competitive bidding as a source of revenues and as a means of improving the spectrum assignment process. . . . In many ways, President Clinton's budget takes a position similar to the Bush and Regan administrations. It has long been the view of NTIA and the FCC that the Commission's current process of spectrum assignment by lottery and comparative hearings is flawed. This view holds that not only do current licensing procedures often result in arbitrary and inefficient spectrum management decisions, but also, by assigning spectrum to non-federal licensees without receiving compensation, the government is failing to manage wisely one of the nations most valuable national resources.

H.R. Rep. No. 103-111 (1993).

8. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993), amending Section 309 of the Communications Act of 1934 (codified in relevant part at 47 U.S.C. § 309(j)).

> [N]othing in the Act required the Commission to choose the licensing scheme at issue here. Although section 309(j) suggests the possibility of using guaranteed installment payments of some kind, the statute also suggests alternative methods of facilitating small business participation. Indeed, in 1998, the Commission decided that "until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses."

NextWave Personal Communications, Inc. v. F.C.C., 254 F.3d 130, 155 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1202 (2002) (citation omitted).

In carrying out its mandate and more — selling licenses at their full commercial value and structuring the sales as typical commercial transactions — the Commission placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. The Commission, by design, adopted the form and substance of an ordinary commercial lending transaction, and the Commission's actions as a commercial lender give rise to the same set of concerns as all other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process. Put differently, the Commission could not responsibly or reasonably determine that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction, including being bound by the terms governing the contract (or, as in the case of UC-NC, by the bankruptcy laws).

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted, and, upon the appeal, the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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